Supreme Court, U.S.
FILED

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No. _____ OFFICE OF THE CLERK

In The

SUPREME COURT OF THE UNITED STATES

EDDIE LEE GALLOWAY

Petitioner

vs.

THE STATE OF CALIFORNIA; The ATTORNEY GENERAL OF THE STATE OF CALIFORNIA; And The SOLICITOR GENERAL OF THE UNITED STATES

Respondents

On Petition For Writ Of Certiorari
To The Supreme Court Of The
State Of California

PETITION FOR WRIT OF CERTIORARI

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IN PROPRIA PERSONA

100 Pg

QUESTIONS PRESENTED

Is a State prisoner entitle to relief for a Federal Constitutional violation and the State court's decision was contrary and involves an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States pursuant to **28 U.S.C. § 2254(d)(1)?**

Is a State prisoner entitle to relief when the State court's decision was based on an unreasonable determination of the facts in light of the evidence presented at the State court proceeding pursuant to **28 U.S.C. § 2254(d)(2)?**

PARTIES TO THE PROCEEDING

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Petitioner, Eddie Lee Galloway, respectfully request that a writ of certiorari be issued to review the judgment of the State court of appeal in this case.

OPINION BELOW

The opinion of the State court of appeal for the second appellate district is reported at **People V. Galloway** 273 Cal. Rptr.167 (1990) **(App. - A)**. The opinion of the Supreme Court of the State of California. **(NO S018012)**; Is not published **(App. - B)** The Opinion of the Supreme Court of the State of California denial of Galloway's petition for writ of habeas corpus **(NO S098732)** Is not Published. **(App. - C).**

STATEMENT OF JURISDICTION

The judgment of the Supreme Court of California was entered on December 20, 1990. **(App. - B)**. The Supreme Court Of California denied Galloway's petition for writ of habeas corpus on December 19, 2001. **(App. - C)**. The jurisdiction of this court is invoked under **28 U.S.C. § 1257(a)**.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The **Fifth Amendment** to the United States Constitution provides in relevant part; "No person shall be deprived of life, liberty or property without due process of law...."

The **Sixth Amendment** to the United States Constitution provides in relevant part; Have the assistance of counsel for his defense.

The **Fourteenth Amendment** to the United States Constitution **Section 1** provides in relevant part; Nor shall any State deprive any person of life, liberty, or property, without due process of law; Nor deny to any person within its jurisdiction the equal protection of the laws.

Title 18 U.S.C. § 201 (C) (1) (A)

(1) Otherwise than as provided by law for the proper discharge of official duty-

(A) Directly or indirectly gives, offers, promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official; or.

Title 18 U.S.C. § 201 (C) (2) provides; Whoever... directly or indirectly, gives offer or promise anything of value to any person for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon trial, hearing or other proceedings, before any court...authorize by the laws of the United States to hear evidence or take testimony shall be fined under this title

or imprisoned for not more than two years, or both.

Title 28 U.S.C. § 516 provides; Conduct of litigation reserved to Department Of Justice; Except as otherwise authorize by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence thereof, is reserved to officers of the Department Of Justice, under the direction of the Attorney General.

Title 28 U.S.C. § 547(1) Duties; Prosecute for Offenses against the United States. **Title 28 U.S.C. § 2254(d)** provides; An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim -

(1) resulted in a decisions that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented at the State court proceeding.

California Business and Professional Code § 6068 Subd. (a) provides; They have a duty to support the Constitution, laws of the United States and California.

California Business and Professional Code § 6128 Subd. (a) provides; It is a crime to utilize deceit or collusion with the intent to deceive any party.

STATEMENT OF THE CASE

The fundamental question in this case did the State court of appeal in it's 1990 opinion; when it reversed in part and affirmed in part petitioner's murder for hire conviction (1) resulted in a decision that was contrary to, and involved an unreasonable application of clearly established Federal law as determined by the Supreme Court of the United States and (2) resulted in a decision that was based on a unreasonable determination of the facts in light of the evidence presented at the State court proceeding.

On October 22, 1990 petitioner's petition for review was filed in the Supreme Court of the State of California: raising three Federal Constitutional grounds (1) Double jeopardy stipulation and ruling (2) Statutory Double jeopardy prohibition (3) Constitutional double jeopardy prohibition.

On December 20, 1990 the Supreme Court of the State of California denied the petition for review. **(App. "B' at 23)**. This denial resulted in a decision that was an unreasonable application of clearly established Federal law as determined by the Supreme Court of the

United States; and (2) resulted in a decision that was based on a unreasonable determination of the facts in light of the evidence presented at the State court proceeding.

On June 29, 2001 petitioner's petition for writ of habeas corpus was filed in the Supreme Court of the State of California raising Federal Statutory and Constitutional claims for relief; (1) The State of California's procedural bar rule that was not consistently followed until October 14, 1994 does not bar a Federal petition for writ of habeas corpus proving Federal statutes and the Federal Constitution were violated during Galloway's trial when the direct appeal was in 1990 (2) Assistant United States Attorney Philip Canale's outrageous conduct violated **18 U.S.C. § 201(C)(2)** The California Business and Professional Code **§ 6068 Subdivision (a)** and **§ 6128 Subdivision (a)** when he promise and favored Arthur Thomas for his testimony in Case #A393643 (3) It is selective prosecution when there is direct evidence Galloway was single out for prosecution for Webb's murder (4) Ineffective assistance of appellate counsel for denying Galloway a known and meritorious defense under **Title 18 U.S.C § 201(C)(2)** California Business and Professional Code **§ 6068 subdivision (a)** and **§ 6128 Subdivision (a)**.

On December 19, 2001 The Supreme Court of the State of California denied petitioner's petition for writ of habeas corpus citing **In**

Re Clark 5 Cal.4th 750 (1993); **In Re Robbins** 18 Cal. 4th 770, 780 (1998) and In Re Miller 17 Cal. 2d 734 (1941) **(App. "C" at 24).**

On June 29, 2001 petitioner Filed a motion to augment the record pursuant to California's Rules of Court **Rule 12(a), 33(b)** and **43 (App."G" at 57-60)**. Requesting eight (8) pieces of crucial exculpatory evidence (1) A copy of the letter Arthur Thomas wrote Assistant United States Attorney Philip Canale (2)A copy of Arthur Thomas' sentencing transcript on September 24, or 25 1987 in Shelby County Justice Complex in Memphis Tennessee (3)A copy of the letters or memos that Assistant United States Attorney Philip Canale wrote to the District Attorney's Office in Shelby County in Memphis Tennessee in Arthur Thomas behalf (4) copy of the letters or memos Assistant United States Attorney Philip Canale wrote to the District Attorney's Office in Los Angeles in Arthur Thomas behalf. (5) A copy of any and all letters or memos the District Attorney's Office in Los Angeles wrote to the District Attorney's Office in Shelby County, in Memphis Tennessee in Arthur Thomas behalf. (6) A copy of the name of the People at East Texas Motor Freight that wanted to kill Frank C. Webb. **(App. "D" 25-28)**. {7) A copy of investigator J. William Litts' investigation report. **(App."D" 27-29)**. (8) The name of the person that Eddie Lee Galloway paid $6000. To kill or murder Frank C. Webb.

The Supreme Court of The State of California has refuse to process this motion.

The Supreme Court of California denial of Petitioner's Petition for writ of habeas corpus and refusal to process petitioner's motion to augment the record; (1) resulted in a decision that was contrary to, and involves an unreasonable application of clearly established Federal law as determined by the Supreme Court of the United States; (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented at the State court proceeding.

A. Background of the 1990 Judgment

On June 9, 1997 The Supreme Court of the United States in **O'Dell v. Netherland** 521 U.S. 151, 156 (1997) held; Before State prisoner may upset his State conviction or sentence on Federal collateral review, he must demonstrate as threshold matter that court-made rule of which he seek the benefit is not **"New"** Id at 156

On July 6, 1983 The Supreme Court of the United States in **Michigan V. Long** 463 U.S. 1032, 1039 (1983) stated; In more recent cases we have ourselves examined State law to determine whether State Courts have used Federal law to guide their application of State law or to provide the actual basis for the decision was reached.

On September 11, 1990 The court of appeal Second Appellate District Division Seven affirmed in part and reversed in part petitioner's conviction. **(App. "A " 1-22)**. The Court of Appeal's interpretation of the double jeopardy clause in their opinion involves an unreasonable application of clearly established Federal law as determined by the Supreme Court of the United States. **(App. "A" at 13)**. See **Maryland v. Louisiana** 451 U.S. 725, 746, 747 (1981) **Brown V. Ohio** 432 U.S. 161, 168 (1977) **Harris v. Oklahoma** 433 U.S. 682, 683 (1977) **Illinois V. Vitale** 447 U. S. 410, 419-421 (1980) also see **United States V. Dixon** 509 U.S. 6888 685, 686 (1993) and **Grady v. Corbin** 495 U.S. 508, 521-524 (1990) (Quoting **28 U.S.C. § 2254(d)(1)** The Court of Appeal's opinion **(App. "A" at 20-22)**. The following evidence satisfies the substantial evidence test and establishes the nexus between appellant's conduct and the victim's death; appellant sent a photograph of the victim a photograph of the victim's house, the victim social security number, and $6000. to a professional in St. Louis to have the victim killed; The victim appeared to have been killed by a professional' The bathroom screen was removed and never found; No fingerprint or other physical evidence were recovered. The court of Appeal's decision was based on a unreasonable determination of the facts in light of the evidence presented in the State Court proceeding. See In **Re Winship** 397 U.S.

358, 361-364 (1970) also see **Jackson v. Virginia** 443 U.S. 307, 315-322 (1979)

It is a violation of due process to convict and punish man without evidence of his guilt. United States Constitution. **Amendment Fourteenth**. (Quoting **Thompson V. Louisville** 362 U.S. 199,206 (1960) also see **Burnsworth v. Gunderson** 179 F.3d 771, 774 (9th Cir. 1999)

The Federal habeas corpus statute authorizes relief if under clearly established Federal law a State Court has been unreason able in applying the governing legal principle to the facts of the case; A State determination may be set aside under this standard if under clearly established Federal law, the State Court was unreasonable in refusing to extend the governing legal principle to a content in which the principle should have controlled. **Ramdaas V. Angelone** 530 U.S. 156, _____, (2000)(Quoting **28 U.S.C. § 2254(d)(1)**.

The Supreme Court of California denied petitioner's Petition for review stating; The Report of Decision is directed not to publish in the official Appellate Reports the opinion in the above entitled appeal, filed September 11, 1990, which appears as modified at 223 Cal.App.3d 971. (Cal. Const., **Art. VI, Section 14; Rule 976**, Cal. Rule of Court.) **(App. "B" at 23)** resulted in a decision that was contrary to and involves an unreasonable application of clearly established Federal

law as determined by the Supreme Court of the United States. **Michigan V. Long** 463 U.S. 1032, 1038, 1039 (1983) (Quoting **28 U.S.C. § 2254(d)(1)**.

The Supreme Court of the State of California denied petitioner's petition for writ of habeas corpus citing **In Re Clark** 5 Cal 4th 750 (1993) **In Re Robbins** 18 Cal. 4th 770, 780 (1998) **Re Miller** 17 Cal. 2d 734 (1941) **(App. "C" at 24)**. resulted in a decision that was contrary to and involves an unreasonable application of clearly established Federal law as determined by the Supreme Court of the United States. **Penry V. Johnson** 531 U.S. 1003, ___ (2001) (Quoting **28 U.S.C. § 2254(d)(1)**.

B. The Proceeding Below.

Petitioner's petition for writ of habeas corpus set forth four crucial issues for relief;

(1) The State of California procedural bar rule that was not consistently followed until October 14, 1994 doe not bar a Federal petition for writ of habeas corpus proving Federal Statutes and the Federal Constitution were violated during Galloway's trial when the direct appeal was in 1990; See **Ford V. Georgia** 498 U.S. 341, $46 (1991); **James V. Kentucky** 466 U.S. 341, 348 (1984) **NAACP V. Alabama Ex Rel Patterson** 357 U.S. 449, 457 (1958).

(2) Assistant United States Attorney Philip Canale's outrageous conduct violated **18 U.S.C. § 201(c)(2)** The California Business and Professional Code **§ 6068 Subdivision (a)** and § 6128 Subdivision (a) When he promise and favored Arthur Thomas for his testimony in Case # A393643.

(3) It is selective prosecution when there is direct evidence Galloway was single out for prosecution for Webb's murder.

(4) Ineffective assistance of appellate counsel for denying Galloway a known and meritorious defense under **Title 18 U.S.C. § 201 (c)(2)** California Business and Professional Code **§ 6068 Subdivision (a)** and **§ 6128 Subdivision (a)**.

I

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR RULING ON THE ESSENTIAL OF THE DOUBLE JEOPARDY CLAUSE TO THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In the opinion below, the Second Appellate Court of Appeal Division Seven implies that it's decision citing State law to deny Petitioner a **Fifth Amendment** right not to be put in jeopardy twice does not conflict with this court's prior decision in **Illinois V. Vitale**

447 U.S. 410, 420-421 (1980) **Grady V. Corbin** 495 U.S. 508, 521-524 (1990) and **United States V. Dixon** 509 U.S.688, 689 695, 696 (993) **(App. "A" 1-22)**.

By so doing the State Court of Appeal decision is contrary and involves an unreasonable application of clearly established Federal law as determined by the Supreme Court of the United States. **Penry V. Johnson** 531 U.S. 1003, ___, (2001) (Quoting **28 U.S.C. § 2254(d)(1)**.

Under double jeopardy principles, conviction on a lesser included offense bars subsequent trial on a greater offense. United States Constitution **Amendment Fifth** and **Fourteenth Illinois v. Vitale** 447 U.S. 410, 420-421 (1980); Double jeopardy clause bars any subsequent prosecution in which the Government, to establish an essential element of an offense charged in that prosecution, will prove conduct that -constitute an offense for which defendant has already been prosecuted; test is not an "actual evidence" or "same evidence" test; critical inquiry is what conduct the state will prove, not the evidence that the state will use to prove that conduct; presentation of specific evidence in one trial doe not forever prevent the state from introducing that same evidence in a subsequent proceeding; however, a state cannot void the dictates of the double jeopardy clause merely by altering in successive, prosecutions the evidence offered to prove

the same conduct United prosecutions the evidence offered to prove the same conduct United States Constitution **Amendment Fifth Grady v. Corbin** 495 U.S. 508, 521-524 (1990). Double jeopardy protection applies both to successive punishments and to successive prosecutions for the same criminal offense. United States Constitution **Amendment Fifth United States v. Dixon** 509 U.S. 688, 689, 695, 696 (1993)

The petition should be granted so that the court may affirm the importance of its long-standing holdings on the Double jeopardy clause of the **Fifth Amendment** apply to the State of California through the due process clause in the **Fourteenth Amendment** to the United States Constitution

II

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S RULING ON THE ESSENTIAL OF ASSISTANT UNITED STATES ATTORNEY PHILIP CANALE'S OUTRAGEOUS CONDUCT VIOLATING TITLE 18 U.S.C. § 201 (C)(2) THE CALIFORNIA PROFESSIONAL CODE § 6068 SUBDIVISION (A) AND § 6128 BUSINESS AND SUBDIVISION (A) WHEN HE PROMISE AND FAVORED ARTHUR THOMAS FOR HIS TESTIMONY IN CASE *I#* A393643.

The Supreme Court has reiterated. In another context, the prevailing rule that "a federal official may not with ignore the limitations which the controlling law has impunity placed on his powers." **Butz V. Economou** 438 U.S. 478, 489 (1978). In the case before this court § 201(c)(2) does not restrict any interest of the sovereign itself; it operates only upon an agent of the sovereign, limiting the way in which the agent carries on the government's interests. "There is no presumption that regulatory and disciplinary measures do not extend to such officers. Taken at face value the language indicates the purpose of Congress to govern conduct of its own officers and employees as well as that of others." Arizona 295 U.S. at 184.

U.S. Postal Inspector Clyde J. Arnold testified on cross examination; that he never promised Arthur Thomas anything, Arthur Thomas had written a letter to Assistant U.S. Attorney Philip Canale. But someone in the U.S. Attorney's Office in some form or another did go to bat for Arthur Thomas. **(App. "D" 29-36).**

Arthur Thomas testified on Direct Examination that he was facing the habitual criminal act in the State of Tennessee, and he wrote a letter to Assistant United States Attorney Philip Canale requesting a five year sentence for his testimony in case # A393643. And that he received the five year sentence on September 24, or 25 in 1987 **(App. "D" 32-33).** Assistant United States Attorney Philip Canale's promise

and favor to Arthur Thomas for his testimony in Case # A393643 violates **Title 18 U.S.C. 201(c) (2)** California Business and Professional Code **§ 6068 Subdivision (a)** and **§ 6128 Subdivision (a)**. The judicial process is tainted and justice cheapened when factual testimony is purchased whether with leniency or money. Because prosecutors bear a weighty responsibility to do justice and observe the law in the course of a prosecution. It is particularly appropriate to apply the strictures of **§ 201(c)(2)** to their activities.

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape nor innocence suffer. **Younq v. United States ex rel. Vuitton et Fils S.A.** 481 U.S. 787, 803 (1987) (Quoting **Berger V. United States** 295 U.S. 78, 88 (1935). The Anti gratuity provision of **§ 201 (c)(2)** indicates Congress's belief that justice is undermined by giving, offering, or promising anything of value for testimony. If justice is perverted when a criminal defendant seeks to buy testimony from a witness, it is no less perverted when the government does so. Because 18 U.S C, **§**

201(c)(2) addresses what Congress perceived to be a wrong, and operate to prevent fraud upon the federal courts in the form of inherently unreliable testimony, the proscription of **§ 201(c)(2)** must apply to the government. See id at 384. Further, the interests of the United States as sovereign militate in favor of applying **§ 201(c) (2)** against federal prosecutors. The sovereign's interests are in the enforcement of the laws and the just administration of its judicial system; applying **§ 201(c)(2)** to all parties in that judicial system advances both interests.

The petitioner's petition should be granted so that the court may affirm the importance of the long-standing holding that the United States Codes, laws California Business and Professional Codes apply to Assistant United Attorneys, and so that it may confirm for the first time this outrageous conduct violates **Amendments Fifth, Sixth,** and **Fourteenth** to the United States Constitution.

III

IT IS SELECTIVE PROSECUTION WHEN THERE IS DIRECT EVIDENCE GALLOWAY WAS SINGLE OUT FOR PROSECUTION FOR WEBB'S MURDER.

This court held; (1) To establish entitlement to Discovery on claim of selective prosecution based on race, defendant must produce credible evidence that similarly situated defendants of other race

could have been prosecuted but were not; (2)To establish a discriminatory effect of prosecution in a race case, defendant must, show that similarly situated individuals of different race were not prosecuted **United States v. Armstrong** 517 U.S. 456 (1996).

On October 4, 1981 Frank Cornelius Webb was killed/or murdered in his home the only person present was Marilyn Webb his wife; of the **(CAUSASIAN RACE) (App. "E" at 37)**.

Earlier on October 3, 1981 Frank Cornelius Webb had a verbal altercation with his wife Marilyn Webb at approximately 17:00 hour Frank Webb left home and returned at 23: 00. **(App. "E" at 38).**

Investigator Morck and Yamato during their full investigation of Frank Cornelius Webb's home. No evidence was found to substantiate Galloway killed or had Webb killed, **(App. 'E" 41-47)**

On October 6, 1981 U.S. Postal Inspector Clyde J. Arnold Jr. from Memphis Tennessee arrived with his files about some mail fraud cases back in Memphis Tennessee involving Eddie Lee Galloway Frank Webb, Marilyn Webb, and many, many more People in Memphis Tennessee. Upon U.S. Postal Inspector Clyde J. Arnold Jr. arrival with his files he immediately started a **Selective Prosecution** case against Eddie Lee Galloway **(Quote)** Mr. Arnold stated; **He felt strongly that one, Eddie Lee Galloway was involved as he had been**

convicted on the basis of Frank Webb's testimony (Unquote) (App. "E" at 46).

(CLYDE ARNOLD ON DIRECT EXAMINATION)

Q. Did you assist the homicide detective in any way in the investigation or was your investigation a separate investigation?

A. My investigation was a joint investigation with Sergeant Morck in that there were certain ways that we could assist him in subpoenaing telephone records through the United States Attorney's Office because I was working obstruction of justice case in that this was my witness and he was murdered as a result of his testimony that was given.

Q. BY MR. ASARI. Were there telephone records subpoenaed?

A. Yes, Sir.

Q. From the Memphis area?

A. Yes, Sir. **(App. "E" at 48).**

(CROSS EXAMINATION OF CLYDE ARNOLD)

Q. But you have—since Frank Webb's death, you've been intimately involved in the investigation of his death

haven't you?

A. I have been involved yes.

Q. And you have been in California on numerous occasions to interview witnesses in that investigation?

A. I went to San Diego, Yes, Sir.

Q. Okay, Now—

A. And also came to L.A.

Q. Do you- do you know who Mr. Litts is?

A. (No response.)

Q. The investigator that wrote that report?

A. There was somebody I met with one of the insurance "companies and I'm not sure it was Mr. Litts, but I did meet somebody from the insurance company.

Q. Okay. Now, is there a reason why you did not follow up on the assertion in Mr. Litts' report that other employees at East Texas Motor Freight wanted to kill Frank Webb or had a Motive to kill him?

A. I didn't follow up on it because it was not my jurisdiction on that particular area, because Sergeant Morck was out here and I would leave that part up to him in the Los Angeles area, **(APP. "E" at 49 - 50).**

(CROSS EXAMINATION OF DETECTIVE ROBERT H. MORCK)

Q. BY MR. CRON. Did you ever do any type of a—did you ever do one or ask to have a gunshot residue test performed on any person connected with this case?

A. Not on any person, no.

Q. Did you have that done on some object?

A. I had the curtains from the bathroom window, test done on the curtain.

Q. And what were the results of that?

A. There was no powder residue on the curtain.

Q. So am I correct in assuming that you found no powder residue anywhere in that location?

A. No.

Q. That— my statement is correct?

A. That's correct I found none.

Q. Did you also direct someone to take fingerprints from the ladder?

A. The ladder was of a coarse wood grain surface and it is what the term is not printable surface. Being outside in the dampness and the wood grain, you could not obtain a fingerprint from it.

Q. Do you recall what the weather conditions were like that night? **(App. "E" at 50-51)**.

Q. And there was no bullet hole in it either, is that correct?

A. No there was not.

Q. And when you arrived at that location did you interview every body who had been present at the time of the shooting?

A. There was only one person present at the time of the shooting that was Mrs. Webb.

Q. Well, he had two children; isn't that correct?

A. Yes.

Q. But they weren't home?

A. Well, they were asleep at that time, but when I got-the time I arrived there, they were over at the Sanchez residence.

Q. Did you determine whether or not they had been home at the time of the shooting or at the Sanchez residence that evening for the evening?

A. I don't recall.

Q. BY MR WESLEY, Would it refresh your recollection to look at your report?

A. Yeah. **(App. "E" at 51-52)**.

MR. WESLEY. I'm not even sure I have it.

THE WITNESS. I recall there was something about one of the children sleeping over the Sanchez residence.

Q. BY MR. WESLEY, Do you recall inquiring of Mrs. Webb whether or not at the time of the shooting she was the only person home and being informed that she was?

A. I believe so.

Q. Now in your investigation did you search the Webb's House thoroughly for weapon?

A. No I did not

Q. And in your investigation did you talk with the neighbor to determine whether or not Mr. Webb. had been having any problems with the neighbors?

A. I believe he didn't get along with a neighbor on his west side but it was neighbor argument over territorial right or whatever.

Q. Now did you determine whether or not at the time

of the incident the Webbs had a dog?

A. Yes, they did.

Q. And was that dog on that particular evening at home or was it also at a neighbor's?

A. The dog was in the backyard.

Q. When you arrived?

A. I believe so. **(App. "E" at 52-53)**.

Petitioner request that this court take **JUDICIAL NOTICE** that Marilyn Webb is a convicted felon; convicted in Federal Indictment NO.80-20043 & 80-20044 in Memphis Tennessee.

A selective prosecution claim asks a court to exercise judicial power over a "special province" of the Executive. **Heckler V. Chaney** 470 U.S. 821, 822 (1985). The Attorney General and United State Attorneys retain "Broad discretion" to enforce the Nations criminal

laws. **Wayte v. United States** 470 U.S. 598, 607 (1985) (Quoting **United States V. Goodwin** 457 U.S. 368, 380 n. 11 (1982). They have this latitude because they are designated" by statute as the President's delegates to help him discharge his Constitutional responsibility to "take care that the laws be faithfully executed" United States Constitution **Article II § 3** See **28 U.S.C. §§ 516, 547**. (Quoting **United States v. Armstrong** 517 U.S. 456, 464 (1996)

The threshold requirement to obtain discovery on the way to proving such a defense must relate to the defense to be proved. **In Armstrong** the Supreme Court held that the defendant must produce "some evidence that similarly situated defendants of other races could have been prosecuted but were not." **Armstrong** 517 U.S. 456, 461, 470 (Quoting **United States v. Turner** 104 F. 3d 1190, 1184 (9th Cir. 1997).

The petitioner's petition should be granted so that the court may affirm the importance of its long-standing holdings that selective prosecution violates **Amendments Fifth, Sixth**, and the **Fourteenth** to the United States Constitution.

IV

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT. S PRIOR RULING ON DUE PROCESS INVOLVING INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL FOR DENYING GALLOWAY A KNOWN AND MERITORIOUS DEFENSE UNDER TITLE 18 U.S.C. § 201 (C) (2) CALIFORNIA BUSINESS AND PROFESSIONAL CODE § 6068 SUBDIVISION AND § 6128 SUBDIVISION (A).

A defendant has a Constitutionally protected right to effective assistance of counsel on direct appeal. United States Constitution. **Amendment Sixth. Smith V. Dixon** 14 F.3d 956, 958, 973 (4th Cir. 1994).

Petitioner's Constitutionally guaranteed right to the effective assistance of counsel was "clearly established" at the time his state-court conviction became final. and therefore petitioner is entitle to habeas relief under **Antiterrorism and Effective Death Penalty Act (AEDPA)** if his appellate counsel's failure to investigate and to present substantial mitigating evidence to the court of appeal was contrary to, and involves "unreasonable application of" clearly establish Federal law as determined by the Supreme Court of the

United States., United States Constitution. **Amendment Sixth**; 28 U.S.C. **§ 2254(d)(1)** (Quoting **William v. Taylor** 529 U.S. 362, ___(2000).

In **Evitts v. Lucey** 469 U.S. (1985); The Supreme Court; indicated that a criminal defendant right to effective assistance of counsel on his first appeal as of right stems from the fact that when a State choose to create appellate courts. Appellate review become "'an integral part of the system for finally adjudicating the guilt or innocence of a defendant'" id. at 393, (Quoting **Griffin V. Illinois** 351 U.S. 12, 18 (1956). The appellate process exists solely for the purpose of correcting errors that occurred at trial court level. See id. at 396 ("In bringing an appeal as of right from his conviction, a criminal defendant is attempting to demonstrate that the conviction with its consequent drastic loss of liberty, is unlawful"), as such we conclude that the right to effective assistance of counsel, both at trial and appellate level "'is recognized not for it own sake, but because of the effect that it has on ability of the accused to receive a fair trial'" **Fretwell** 506 "U.S. at 369, (Quoting **United States v. Cronic** 466 U.S. 648, 658 (1984) (Citing **Goodwin v. Johnson** 132 F 3d 162, 163, 174 (5th Cir. 1988).

Right to appellate counsel is limited to first appeal as of right and attorney need not advance every argument regardless of merit argued by appellant but must be available to assist in preparing and submitting brief to appellate court and must play role of active

advocate, rather than mere friend of the court assisting in detached evaluation of appellant's claim. United States Constitution. **Sixth** and **Fourteenth Amendment**. **Evitts V. Lucey** 409 U.S. 387 (1985). Petitioner request that this court take **JUDICIAL NOTICE** to appellate counsel Dennis A. Fischer's June 12, 1990 letter to The Second Appellate Court Of Appeal in pertinent part; (Quote) any failure to cite both Constitutions in the briefs was an over sight, and most emphatically not a waiver. And to the extent that the only reason Mr., Galloway would not prevail in this case is because he neglected to cite the **Fifth Amendment**, it would be no" more fair to visit the transgression upon this defendant that in **People v. Belcher Supra** 11 Cal. 3d 91; Where our Supreme Court held that defense counsel's failure to adequately assert the double jeopardy argument (which it found to be reversible error but for the omission) entitle the defendant to reversal of his conviction on the ground of ineffective representation. (Unquote) **(App."F" at 55-56)**.

When counsel's constitutionally deficient performance deprive defendant of appeal, that he otherwise would have taken, defendant has made out successful ineffective assistance of counsel claim entitling him to an appeal. United States Constitution **Amendment Sixth. Roe V. Flores-Ortega** 528 U.S. 470,(2000)

a). It was a plain error and highly prejudicial when appellate counsel

fail to challenge on direct appeal or in a petition for writ of habeas corpus; Assistant United states Attorney Philip J. Canale's outrageous conduct violated **18 U.S.C. § 201(c)(2)** the California Business and Professional code **§ 6068 Subdivision (a)** and **§ 6128 Subdivision (a)** When he promise and favored Arthur Thomas for his testimony in Case # A393643.

b). It was a plain error and highly prejudicial when appellate counsel fail to challenge on direct appeal or in a petition for writ of habeas corpus; It is selective prosecution when there is direct evidence Galloway was single out for prosecution for Webb's murder.

c). It was a plain error and highly prejudicial when appellate counsel fail to file a motion pursuant to **Rule 12(a), 33(b)** and **43** of The California Rules of Court to augment the record and obtain the crucial eight (8) pieces of **Exculpatory Evidence (App. "G" 57-60)**.

Appellate counsel Dennis A. Fischer's acts and Omissions denied Galloway Exculpatory Evidence on Direct Appeal and in a petition for a writ of habeas corpus; in violation of the **Brady Rule** See **Brady V. Maryland** 373 U.S. 83. 87 (1963).

For there to be a plain error, there must be "error" that is "plain" and that affects "substantial rights."

Plain error rules doe not create tow separate categories, one of plain errors and one of defect affecting substantial rights; **United**

States v. Olano 507 U.S. 725, 732, 733 (1993)

Appellate counsel's acts and omissions denied Galloway procedural due process when he refuse to file a motion to augment the record and obtain the eight (8) pieces of crucial **Exculpatory Evidence** to do an affirmative appeal against the conviction for murder for hire. See **United States v. Salerno** 481 U.S. 639, 746 (1987).

Appellate counsel acts and omissions has caused Galloway to suffer a substantial injurious effect. See **Brecht V. Abrahamson** 507 U.S. 619, 627 (1993)

A first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney.[1] This result is hardly novel. The petitioner in both **Anders v. California** 386 U.S. 738 (1967) and **Entsminger v. Iowa** 386 U.S. 748 (1967) claimed that although represented in name by counsel they had not received the type of assistance constitutionally required to render the appellate proceedings fair. In both cases we agreed with petitioner holding that counsel's failure in **Anders** to submit a brief on appeal and counsel's

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[1]As **Ross V. Moffitt** 417 U.S. 600 (1974) held the consideration governing a discretionary appeal are some what different. See **infra** at 839. Of course the right to effective assistance of counsel is dependent on the right to counsel itself. See **Wainwright v. Torna** 455 U.S.....586. 587-588 (1982) (per curiam) "Since respondent had no constitutional right to counsel he could not be deprived of the effective assistance of counsel by his retained counsel's failure to file the application timely')(footnote omitted).

waiver in **Entsminger** of the Petitioner's right to a full transcript rendered the subsequent judgment against the petitioner unconstitutional.[2] In short the promise of Douglas that a criminal defendant has a right to counsel on appeal like the promise of **Gideon** that a Criminal defendant has a right to counsel at trial would be futile gesture unless it comprehend the right to the effective assistance of counsel. **Evitts v. Lucey Supra** 469 U.S. at Pp. 396, 397.

The central inquiry in a criminal case ought to be whether the defendant committed the crime charged. By diverting the inquiry to another subject, "the focus of the trial, and the attention of the participant therein, are diverted from the ultimate question of guilt or innocence that should be the central concern in a criminal proceeding."

Stone v. Powell 428 U.S. 465, 489-90 (1976)(Quoting **United States v. Artero** 121 F.3d 1256, 1262 (9th, C 1997).

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[2]Moreover **Jones V. Barnes** 463 U.S. 745 (1983) adjudicated a "Similar claim "of ineffective assistance by appellate counsel." id., at 749, In **Jones** the appellate attorney had failed to raise every issue requested by the criminal defendant. The Supreme Court rejected the claim, not because there was no right to effective assistance of appellate counsel, but because counsel's conduct: in fact served the goal "vigorous and effective advocacy." Id., at 745, The court's reasoning would have been entirely superfluous if there were no right to effective assistance in the first place

The petitioner's petition should be granted so that the court may affirm the essential elements of ineffective assistance of appellate counsel and, so it may confirm it violates **Amendments Sixth** and **Fourteenth** to the United States Constitution.

CONCLUSION

This case present some extraordinary questions of Exceptional importance whether petitioner is entitled to relief from a judgment whereas the State Court of Appeal and the State Supreme court has denied petitioner's Federal Constitutional and Statutory claims citing State law, resulted in a decision that's contrary to, and involves an unreasonable application of clearly established Federal law as determined by the Supreme Court of the United States resulted in a decision based on a Unreasonable determination of the facts in light of the evidence presented in the State Court proceeding.

Accordingly petitioner respectfully request that his petition for writ of certiorari be granted.

Dated: May 6, 2002

Respectfully Submitted

Eddie Lee Galloway

Eddie Lee Galloway D-85343

APP. - 1
APPENDIX - A

PEOPLE v. GALLOWAY

The PEOPLE, Plaintiff and Respondent,

v.

Eddie Lee GALLOWAY, Defendant and Appellant,

No. B835428.

Court of Appeal, Second District, Division 7.

Sept. 11, 1990.

As Modified Sept. 21, 1990.

Defendant was convicted in the Superior Court, Los Angeles count, No. A393643, Gerald J. Levie and Michael Anthony Tynan, JJ., of first-degree murder. Defendant appealed. The Court of Appeal, Fred Woods, J., held that: (1) decision of another division denying defendant's extraordinary writ petitions constituted law of the case, and federal conspiracy to injure federal witness conviction; (2) federal conspiracy to injure federal witness conviction; (3) state constitutional prohibition against double jeopardy did not bar prosecution; and (4) there was sufficient evidence that murder of victim was linked to conspiracy to murder victim.

Affirmed in part and reversed in part.
Johnson, J., concurred and field opinion.

1. Criminal Law 1180

Prior decision of another panel of Court of Appeal that federal conviction for conspiracy to injure a federal witness did not bar state murder prosecution on double jeopardy grounds was law of the case; the acts constituting murder were not same acts on which the federal conspiracy conviction was based and thus the prior decision was not a manifest misapplication of existing principles. West' Ann.Cal.Penal Code §§182, 187, 190.2(a)(1), (b), 656, 793, 12022(a)(1).

2. Criminal Law 1180

Prior decision of another panel of Court of Appeal that federal conviction for conspiracy to injure a federal witness did not bar state conspiracy to murder prosecution on double jeopardy grounds was not law of the case; the application of the law of the case doctrine produced unjust result since there was only one conspiracy and the conspiratorial acts to injure and to murder were the same. West' Ann.Cal.Penal Code §§ 182, 187, 190.2(a)(1), (b), 656, 793, 12022(a)(1).

3. Double Jeopardy 184

State constitutional prohibition against double jeopardy did not bar successive California prosecution for conduct previously adjudicated in court of another jurisdiction. West's Ann.Cal. Const. Art. 1. §15; West's Ann.Cal.Penal Code §§ 654, 656, 793, 1023.

4. Homicide 234(1)

There was sufficient evidence linking murder to conspiracy to murder involving defendant, including evidence that defendant had sent $6,000 and information regarding victim to professional in St. Louis to have victim killed and bought and paid premiums on $90,000 worth of insurance on victim's life. West's Ann.Cal.Penal Code § 182, 187,

Law Offices of Dennis A. Fischer, Dennis A. Fisher, Santa Monica, and John M. Bishop, Riverside, for defendant and appellant.

John K. Van de Kamp, Att. Gen., Richard B. Inglehart, Chief Asst. Atty. Gen., Edward T. Fogel, Jr. Sr. Asst. Atty. Gen., Paul C. Ament, Supervising Deputy Atty. Gen. And Robert C. Schneider, Deputy Atty. Gen., for plaintiff and respondent.

FRED WOODS, Associate Justice.

Appellant was convicted of first degree murder with special circumstances (pen. Code §§ 187,[1] 190.2, subd. (a)(1) and conspiracy to commit first degree murder (§§ 182, 187). He was sentenced to life without possibility of parole plus one year.[2] Appellant claims the

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[1]Unless otherwise noted all statutory references are to the Penal Code.

[2]The 25 years to life sentence on count II. conspiracy, was stayed pending completion of sentence on Count I.

law of the case doctrine is inapplicable, that his former federal convictions barred the instant prosecution (§§ 656 and 793), and that there was insufficient evidence the murder of the victim was the result of the conspiracy to murder the victim. We affirm the murder conviction and reverse the conspiracy conviction.

FACTUAL AND PROCEDURAL BACKGROUND

On October 4, 1982, shortly before 1:00 a.m., Frank Webb was in the bathroom of his Carson home. The sliding window was fully open, covered only by a see through yellow curtain. A screen which had covered the window was missing. Marilyn Webb, his wife, was in the kitchen getting a coke when she heard "a popping noise." She walked back to the bedroom, called "Frank," and then saw her husband lying on the bathroom floor. He had been shot and killed by a single .32 caliber bullet to the right side of his head.

Since appellant concedes the evidence sufficiently shows that he conspired to murder Frank Webb (victim), and that Webb was murdered, we briefly outline the events which led to the murder. Later, we separately consider appellant's claim the evidence is insufficient to link the murder to the conspiracy to murder.

In the late 1970's appellant, Frank Webb, and others formed a Memphis, Tennessee ring which falsified accidents and defrauded insurance companies. Appellant, Webb and others were indicted by federal authorities. Webb cooperated with the prosecution and aided them in surreptitiously recording appellant and other confederates. Copies of those recordings were provided to appellant and the other defendants. In trail, just before the recordings were to be played to the jury, appellant pleaded guilty to both indictments. In November 1980 he was sentenced to three years imprisonment but remained at liberty pending appeal.

Almost immediately thereafter appellant, with the assistance of others, began taking out insurance policies on Frank Webb's life. Webb was unaware of these policies. Beneficiaries were family or friends of appellant. After Webb's murder, claims were made on each of the four policies, obtained from four different companies. The claims totaled $90,000.

State and federal investigations of these claims and Webb's murder led to federal indictments of appellant and others. In February 1982 appellant was convicted in federal court, of 17 counts of mail fraud

and conspiracy to commit mail fraud. All the charges involved the fraudulent insurance policies on the life of Frank Webb. (Federal indictment 81-20330-H.) In April 1982 appellant was again indicted. These federal charges included 21 counts of mail fraud (involving the other insurance companies conspiracy to commit mail fraud, obstruction of justice and conspiracy to injure a federal witness, Frank Webb. (Federal indictment 82-20061_W.) All of these charges involved the fraudulent insurance policies on and the murder of Frank Webb. Appellant pleaded guilty to all counts.

On may 17, 1984, the Los Angeles County District Attorney filed the instant information charging appellant and others with the death penalty murder of, and conspiracy to murder, Frank Webb.[3]

Appellant sought to have the information set aside (§ 995) based upon his former federal convictions. When this motion was denied he petitioned the Court of Appeal for a writ of prohibition, seeking review of that denial. A week later, before the court of Appeal had acted on his first petition, he filed another petition for a writ of mandate and/or prohibition.

On August 15, 1985, Division 3 of this court consolidated the petitions and issued an order remanding the matter to the superior court for a clarification of its findings.

On September 27, 1985, the superior court (Judge Gerald J. Levie) made additional findings and thereafter appellant filed a supplemental petition with the Court of Appeal.

In a November 8, 1985, order the Court of Appeal, Division 3, issued its decision denying the petitions. The California Supreme Court summarily denied review.

Following a court trial on March 22, 1988, appellant was convicted. On March 31, 1988, the penalty trial was held and on May 10, 1988, appellant was sentenced on murder conviction to life without possibility of parole plus one year. A 25 years to life sentence for conspiracy was stayed.

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[3]A third count, conspiracy to commit grand theft was dismissed on motion of the district attorney.

CONTENTIONS

Appellant contends:

1. The November 8, 1985, Court of Appeal decision is not the law of this case.
2. The federal conspiracy to injure a federal witness conviction bared the instant murder conviction.
3. The federal conspiracy to injure a federal witness conviction barred the instant conspiracy to murder conviction.
4. The California constitutional protection against double jeopardy (Cal. Const., art. I, §15) barred the instant prosecution.
5. There was insufficient evidence that the murder of the victim was linked to the conspiracy to murder the victim.

DISCUSSION

1. Appellant contends the November 8, 1985, Court of Appeal decision is not the law of this case.

As classically expressed in Tally v. Ganahl (1907_ 151 Cal. 418, 421, 90 P. 1049"(t)he doctrine of the law of this case is this: That where, upon an appeal, the Supreme Court, in deciding the appeal, states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent appeal, and as here assumed, in any subsequent suit for the same cause of action, and this although in its subsequent consideration this court may be clearly of the opinion that the former decision is erroneous in that particular."

Since Tally the doctrine has been expanded. It applies to original proceedings (People v. Medina (1972) 6 Cal.3d 484, 491, fn. 7, 99 Cal.Rptr. 630, 492 P.2d686), Court of Appeal decisions (People v. Shuey (1975) 13 Cal.3d 835, 841, 120 Cal.Rptr. 83, 533 P.2d. 211), and criminal as well as civil matters (Ibid.), irrespective of who initiated appellate review, the defendant or the prosecution (id. at p. 845, 120 Cal.Rptr. 83, 533 P.2d 211). Although, as the name indicates, the doctrine concerns only issues of law not fact (id. at p. 842. 120 Cal.Rptr. 83, 533 P.2d 211), when the doctrine applies it binds even a higher court. (Id. at p. 841, 120 Cal.Rptr. 83, 533 P.2d 211; Price v. Civil Service Com. (1980) 26 Cal.3d 257, 267, fn. 5, 161 Cal.Rptr. 475, 604 P.2d 1365)

"Application of the (doctrine) is now subject to the qualifications that 'the point of law involved must have been necessary to the prior decision, that the matter must have been actually presented and determined by the court, and that application of the doctrine will not result in an unjust decision.'" (People v. Shuey, supra, 13 Cal.3d 835, 842, 120 Cal.Rptr. 83, 533 P.2d 211.)

Although law of the case is a procedural not jurisdictional doctrine (England v. Hospital of Good Samaritan (1939) 14 Cal.2d 791, 795, 97 P.2d 813), when applicable, a court is "foreclosed by the rule of procedure from redetermining the legal (issue)." (People v. Shuey, supra, 13 Cal.3d at p. 843, 120 Cal.Rptr. 83 533 P.2d 211.) Its attempt to do so is error. (Id. at p. 845, 120 Cal.Rptr. 83 533 P.2d 2aa.)

The rationale for the doctrine is described by Shuey.

"From a policy standpoint it is not difficult to envisage the frustrating consequences that could flow from a practice allowing different panels of the Court of Appeal to redetermine issues which were disposed of on a previous appeal in the same case. For example, if the reasoning of Shuey II (115 Cal.Rptr. 447) were to control, the matter would be remanded for yet a third hearing. The trial court, under its mandate, would then consider the arrest theory. Among the various results which might emerge from such a hearing could be a finding that the occupation of the Shuey apartment constituted a valid arrest, thus rendering moot the original question whether the discovery of the contraband was factually caused by the 'illegality.' After the denial of their motion to suppress, defendants might again seek pretrial review in another proceeding entitled 'Shuey v. Superior Court.' This third appellate panel might correctly conclude that the decision in Shuey II was erroneous that Shuey I (30 Cal.App.3d 535, 106 Cal.Rptr. 452) was controlling, and remand yet again for consideration of the issue of causation. The mind boggles at the possibilities which could arise should the People be no more successful at the fourth hearing than they were at the second. Shuey IV followed by Shuey V? Theoretically there could be no certain termination of this sequence, and the parties potentially could find themselves in a Catch-22 position of receiving an infinite lesson in aberrations of appellate procedure." (People v. Shuey, supra, at pp. 840-841, 120 Cal.Rptr. 83, 533 P.2d 211.)

Appellant does not dispute two of the requisites for invoking the law of the case doctrine. By his 1985 petitions he presented the

issues of double jeopardy, former conviction, and collateral estoppel. Additionally, appellant does not dispute that a determination of those issues was necessary to the court's decision. But appellant does contend that the doctrine requires an "opinion" and the November 9, 1985, decision was merely an "order."

The Court of Appeal decision, entitled an "ORDER," read as follows: "THE COURT: (1) The above entitled petitions for writ of mandate and prohibition have been read and considered. The petitions are consolidated for purposes of these proceedings. (1) this court has determined that there is no double jeopardy bar to prosecution in this state because: (1) California has jurisdiction to prosecute petitioners; (2) California has a compelling state interest in protecting a California resident where the conspiracy to commit murder is formed outside this state; (3) the additional act required for prosecution in California subsequent to a federal action in Tennessee is the killing (see People v. Walker (1981) 123 Cal.App.3d 981, 177 Cal.Rptr. 147; People v. Belcher (1974) 11 Cal.3d 91, 113 Cal.Rptr. 1, 520 P.2d 385; People v. Comingore (1977) 20 Cal.3d 142, 141 Cal.Rptr. 542, 570 P.2d 723); and (4) federal and state interest are substantially different which state interest has not been vindicated by the federal action. Therefore, there is no constitutional, statutory or collateral estoppel bar to prosecution in California. (1) The petitions are denied."

Rosato v. Superior Court (1975) 51 Cal.App.3d 190 124 Cal.Rptr. 427, principally relied upon by appellant and characterized by him as involving "essentially identical circumstances," is distinguishable. Rosato describes its earlier denial of a petition for a writ of prohibition as "summary," containing only "an explanatory comment" which Rosato did not regard as a "formal opinion." (Id. at p. 230, 124 Cal.Rptr. 427.) Since Rosato fails to include its earlier decision as part of its opinion we are bound by Rosato's characterization of it, a characterization that does not describe the subject November 8, 1985, decision.

Rather, the November 8, 1985, decision is analogous to this order, held to be a decision on the merits and constituting the law of the case:

"THE COURT: The petition for writ of prohibition, filed April 28, 1976, has been read and considered. The court has also read and considered the points and authorities of real party in interest In

opposition, field May 3, 1976. It appearing that the record supports the implied finding of the trial court that the superior court action was field for purpose of delay, the petition is denied." (Richer v. Superior Court (1976) 63 Cal.App.3d 748, 753, 134 Cal.Rptr. 52.)

Moreover, in Rosato when the court initially denied the petition it "did not have the full record" (Rosato v. Superior Court, supra, 51 Cal.App.3d at p. 231, 124 Cal.Rptr. 427), a claim not here made.

A second obstacle to applying the law of the case doctrine, appellant asserts, is that its purpose, judicial economy, would not be served. Searle and Nally are cited as authority for this proposition.

Searle v. Allstate Life Ins. Co. (1985) 38 Ca.3d 425, 212 Cal.Rptr. 466, 696 P.2d 1308 involved two trials. Following the first, the Court of Appeal reversed, holding that only a "sane" person can commit "suicide." When the Supreme Court reviewed the second trial it refused to be bound by the mistaken Court of Appeal holding because other error, requiring reversal, had been committed. it said, "(t)he fact that reversal is necessary in any event frees us form the compulsion that the rule of law case might otherwise impose on us...." (Id. at p. 435, 212 Cal.Rptr. 466, 696 P.2d 1308.)

Nally v. Grace Community Church (1988) 47 Cal.3d 278, 253 Cal.Rptr. 97, 763 P.2d 948 follows Searle in holding the law of the case doctrine inapplicable when reversal is otherwise required.
Searle and Nally are inapposite and appellant's assertion is mistaken. Unlike Searle and Nally, appellant has not demonstrated that the law, as decided by the November 8, 1985, opinion, is erroneous. Nor has appellant established that the instant judgment, on independent grounds, must be reversed. Finally, although "judicial economy" alone does not determine whether or not law of the case doctrine applies (see, e.g., Pigeon Point Ranch, Inc. v. Perot (1963) 59 Cal.2d 227, 28 Cal.Rptr. 865, 379 P.2d 321), here judicial economy would be served by applying the doctrine. Except for appellant's narrow insufficiency of evidence contention, applying law of the case silences appellant's contentions, requires an affirmance of the judgment, and save for higher review, terminates this litigation.

Appellant makes still a third objection. He argues that the court which issued the November 8, 1985, opinion denied him oral argument

opportunity and therefore its opinion cannot have law of the case effect.

While it is true that appellant was not afforded an opportunity to orally argue, we conclude that such an opportunity is not essential to law of the case.

In People v. Brigham (1979) 25 Cal.3d 283, 157 Cal.Rptr. 905, 599 P.2d 100 the Supreme Court held that there is a right to orally argue on appeal. (Id. at pp. 286, 289, 157 Cal.Rptr. 905, 599 P.2d 100.) The Court of Appeal, in summarily disposing of the defendant's appeal of his robbery convictions without allowing oral argument, committed error.

Brigham did not hold, despite a single stray quoted reference to "original proceeding(s)' (Id, at p. 286, 157 Cal.Rptr. 905, 599 P.2d 100), that such a right applied to original proceedings.

People v. Medina, supra, 6 Cal.3d 484, 99 Cal.Rptr. 630, 492 P.2d 686 is also distinguishable. There a Court of Appeal, by minute order and without an opinion, summarily denied a petition seeking review of an order denying a motion to suppress evidence (§ 1538.5). Medina held that this "postcard" denial was not the law of the case. Although it cited denials of oral argument, the buttresses for the court's holding were the constitutional mandate that "decisions... shall be in writing with reasons stated" (Cal. Const., art. VI §14 and avoidance of "improper conjecture and surmise as to the theoretically possible mental processes of the justices." (People v. Mendian, supra, at p. 492, 99 Cal.Rptr. 630, 492 P.2d 686.)

Similarly unpersuasive is People v. Getty (1975) 50 Cal.App.3d 101, 123 Cal.Rptr. 704 where in a footnote (id. at p. 106, fn. 3, 123 Cal.Rptr. 704), the court discussed the inapplicability of law of the case, notwithstanding that both parties agreed the doctrine was inapplicable. (Ibid.) Getty cited "no opportunity for oral argument: (ibid.) as a procedural defect but substantively concluded "that applying the 'law of the case' doctrine... would result in our deliberate enforcement of 'a manifest misapplication of existing principles resulting in substantial injustice.' " (Ibid.)

An opportunity to orally argue was not afforded in either Pigeon Point Ranch, Inc. v. Perot, supra, 59 Cal.2d 227, 28 Cal.Rptr. 865, 379 P.2d 321 nor Richer v. Superior Court, supra, 63 Cal.App.3d 748, 134

Cal.Rptr. 52 but the doctrine was, nevertheless, held applicable in both. (See also People v. Scott (1976) 16 Cal.3d 242, 128 Cal.Rptr, 39, 546 P.2d 327 and People v. Shuey, supra, 13 Cal.3d 835, 120 Cal.Rptr. 83, 533 P.2d 211 which do not mention oral argument as essential to law of the case.)

We find that appellant had adequate opportunity to fully present and argue his views, although in writing only, and that the record, over three inches thick, did not require oral argument in order for the November 8, 1985, decision to have law of the case effect.

Appellant's final protest is that application of the doctrine would result in an "unjust decision." [4] "This broad exception has evolved gradually as courts strove to avoid the harsh consequences which may result from a strict application of the rule." (People v. Shuey, supra, at p. 845, 120 Cal.Rprtr. 83, 533 P.2d 211.)

But, as Shuey observed, "if the rule is to be other than an empty formalism more must be shown than that a court on a subsequent appeal disagrees with a prior appellate determination." (Id. at p. 846. 120 Cal.Rptr. 83, 533 P.2d 211.) In order to satisfy the "unjust decision." test "judicial order demands there must at least be demonstrated a manifest misapplication of existing principles resulting in substantial injustice before an appellate court is free to disregard the legal determination made in a prior appellate proceeding." (Ibid.) (Emphasis added.)

Therefore, ironically, in order to give law of the case effect to the November 8, 1985, opinion, and not redetermine legal issues it decided, we must consider those same legal issues if only to be sure there has been no "manifest misapplication of existing principles."

We, thus, defer our conclusion concerning law of the case until we consider appellant's other, affected contentions.

2. Appellant contends the federal conspiracy to injure a federal witness conviction barred the instant murder conviction.

Section 656 provides: "Whenever on the trial of an accused person it appears that upon a criminal prosecution under the laws of another

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[4]Appellant refers to his unjustified prosecution and punishment as satisfying this "unjust decision" test. Shuey provides a different definition.

State, Government, or country, founded upon the act or omission in respect to which he is on trial, he has been acquitted or convicted, it is State, Government, or country, founded upon the act or omission in respect to which he is on trial, he has been acquitted or convicted, it is a sufficient defense."[5] It is not disputed that "on the trial" of appellant "it appear(ed)" he had convicted under the laws "of another government." If that conviction, federal conspiracy to injure a federal witness, was "founded upon the act" for which appellant was on trial for murder, then he had a sufficient defense.

Comparatively few cases have construed the section 656 phrase "founded upon the act." The first to do so was People v. Candelaria (1956) 139 Cal.App.2d 432, 294 P.2d 120 (Candelaria I). Candelaria robbed a federal depository bank teller of about $950, was promptly arrested, charged in federal court with bank robbery, and pleaded guilty. But when the federal judge modified his original five year sentence to 60 days the district attorney charged the defendant with robbery (of the same bank teller). The trial court rejected the defendant's former conviction and double jeopardy pleas and defendant was again convicted.

In reversing the conviction and explicating "founded upon the act," the court stated, "the federal prosecution and the state prosecution related to the one robbery involving the same Ida Holland, and both prosecutions related to the same taking of the same money at the same time and place. The only additional element involved in the federal prosecution was that the money belonged to a national bank whose deposits were federally insured. The additional element, regarding the status of title to or insurance on the money, pertained to the matter of jurisdiction of the federal court, and it did not pertain to any activity on the part of defendant in committing robbery. The physical act or conduct of defendant in taking the money was the same whether the robbery be considered as a federal offense or a state offense. All the acts constituting the state offense were included in the federal offense and were necessary to constitute the federal

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[5]Section 793, a related provision, reads: "When an act charged as a public offense is within the jurisdiction of another State or country, as well as of this State, a conviction or acquittal thereof in the former is a bar to the prosecution or indictment therefor in this State."

offense. It is clear that, within the meaning of said section 656, the federal conviction was 'founded upon the act' in respect to which the defendant was tried in the present case. It appears, as a matter of law, that the previous federal conviction is a sufficient defense in the present case." (Id. at p. 440, 294 P.2d 120.)

The message of Candelaria I is clear and was not lost on the district attorney. He promptly charged the defendant with burglary. Again defendant's double jeopardy and former conviction defenses were rejected and again defendant was convicted. In reviewing the burglary conviction and denying defendant's section 656 defense Candelaria II stated, "The 'act' spoken of in the statute must be 'the same act.' The burglary act complained of in the present case, that is, the entering of the building with the intent to commit a theft, is not the same act complained of in the federal court, namely, that he pointed a gun at the teller and by force and fear compelled her to deliver over to him certain monies." (People v. Candelaria (1957) 153 Cal.App.2d 879, 884, 315 P.2d 386.)

People v. Williams (1971) 18 Cal.App.3d 925, 96 Cal.Rptr. 291 is consistent with both Candelaria decisions. Williams was convicted, in federal court, of possession of stolen mail and then, in state court, convicted of forgery, On affirming the forgery conviction and rejecting the section 656 defense Justice Jefferson commented, "In the case at bench, the federal offense was the possession by defendant of stolen United States mail. It made no difference wither the mail contained the checks that defendant was convicted of forging or not. On the other hand, the gist of the forgery statute is that any person who, with intent to defraud signs the name of another person, or of a fictitious person, knowing he has no authority so to do, or falsely makes any check or utters, publishes or passes any check or attempts to pass any check as true and genuine is guilty of forgery. None of these elements have any connection with the possession of stole mail. Here, the testimony hardly would be applicable to both offenses. The check on which the forgery conviction was based was in on way connected with possession of stolen mail in the federal offense. Sections 656 and 1023 Penal Code are not a bar in this case because the prosecution is for different offenses, founded upon different acts." (Id. at p. 928, 96 Cal.Rptr. 291.)

The first Supreme Court decision to interpret section 656 is People v. Belcher (1974) 11 Cal.3d 91, 113 Cal.Rptr. 1, 520 P.2d 385. Belcher

and an accomplice were to drive two "narcotic buyers" to a buy site.

The "narcotic buyers" were undercover federal and state narcotic agents and their chauffeurs were robbers Upon arrival at the buy site, Belcher and his accomplice drew guns, took the agents' wallets and $400 of federal "buy funds."

In federal court, Belcher was tried for assault upon a federal officer engaged in official duties. He was acquitted. he was then charged in state court with two counts of robbery and one count of felony assault. At trial, defense counsel only raised the former acquittal defense by a motion to dismiss and failed to specify section 656 or any other statutory basis for the motion. The trial court denied the motion and Belcher was convicted of all three charges.

On appeal, the California Supreme Court considered the former acquittal defense (§ 656) through the prism of ineffective assistance of counsel. It noted "at the outset that prosecution and conviction for the same act by both state and federal governments are not barred by the constitutional protection against double jeopardy (Abbate v. United States (1959) 359 U.S. 187, 194-195 (79 S.Ct. 666, 670-671, 3 L.Ed.2d 729); Bartkus v. Illinois (1959) 359 U.S. 121, 136 (79 S.Ct. 676, 685, 3L.Ed.2d 684); United States v. Lanza (1922) 260 U.S. 377, 382 (43 S.Ct. 141, 142, 67 L.Ed. 314)." [6] (People v. Belcher, supra, at pp. 96-97, 113 Cal.Rptr. 1, 520 P.2d 385.) It also observed that states could, and California did, provide greater double jeopardy protection than afforded under the Fifth Amendment of the United States Constitution. (Id. at p. 97, 113 Cal.Rptr. 1, 520 P.2d 385.) Additionally, it pointed out that section 654,[7] whose scope and applicability differed form section 656, did not apply to successive federal and state prosecutions. (Id. at pp. 97-98, 113 Cal.Rptr. 1, 520 P.2d 385.)

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[6]Grady, District Attorney of Dutchess County v. Corbin (1990) - U.S.-, 110 S.Ct. 2084, 109 L.Ed.2d 548, which construes the double jeopardy clause and does not affect the Abbate-Bartkus rule, is inapposite.

[7]The section reads: "An act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one; an acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other."

In addressing section 656 the court recited the facts of Candelaria I and Candelaria II and stated, "These two cases—both involving the same defendant and transaction but charging separate offenses—clearly demonstrate the meaning to be given the terms 'act or omission' as they are used in section 656. Under this section, a defendant may not be convicted in another jurisdiction if all the acts constituting the offense in this state were necessary to prove the offense in the prior prosecution (People v. Candelaria, supra, 139 Cal.App.2d 432, 440 [294 P.2d 120); however, a conviction in this state is not barred where the offense committed is not the same act but involves an element not present in the prior prosecution. (People v. Candelaria, supra, 153 Cal.App.2d 879, 884 (315 P.2d 386].)" (Id. at p. 99, 113 Cal.Rptr. 1, 520 P.2d 385.)

The court then applied this test to the felony assault conviction, count three.

"Under this test, defendant Belcher's conviction on the third count—assault with a deadly weapon upon Officer Johnson—must be reversed. The Attorney General concedes that the state conviction requires proof of the same acts by defendant as the federal conviction. Since defendant was acquitted of assault upon Johnson in federal court, he cannot be convicted for the same assault upon the same person in the subsequent state prosecution." (Ibid.) (Original emphasis.)

To the attorney general's argument that section 656 was inapplicable because the federal offense included an element absent from the state offense, viz. that the assault victim was a federal officer engaged in official duties, the court cited Candelaria I, which rejected the identical argument, and adopted its reasoning: "conviction of the federal offense required proof of no additional act on the part of defendant; it merely required proof of the status of the victim...." (Id. at p. 100, 113 Cal.Rptr. 1, 520 P.2d 385.) (Original emphasis.)

Applying the same test to the robbery convictions, the court's analysis paralleled Candelaria II: "However, when we apply the test of section 656 to defendant's conviction upon the first and second counts-robbery of Johnson and robbery of Norton, respectively—we reach a different result. A conviction for each of these offenses requires at the very least proof of an important additional act by defendant-the 'taking of personal property in a possession of another' (§ 211)—that need not be proved to establish the federal offense of

assault with a deadly weapon upon federal officer. Accordingly, the convictions of first degree robbery under the first two counts are not convictions founded upon the same act or omission for which defendant was acquitted in federal court, and these convictions must stand." (Id. at pp. 100-101, 113 Cal.Rptr. 1, 520 P.2d 385.)

People v. Comingore (1977) 20 Cal.3d 142, 141 Cal.Rptr. 542 570 P.2d 723 answered two questions not directly raised in Candelaria or Belcher: whether the coverage of section 793 see fn. 5 differed from section 656 and whether a different mental state constituted a different "act."

Comingore stole a car in California and drove it to Oregon. There he was charged with and convicted of using another's vehicle without consent. Although sentenced to a maximum six month term he was released on "bench parole" after four days. California authorities then charge him with grand theft auto (§ 487, subd. (3)) and felony joyriding (Veh.Code, § 10851). The trial court dismissed the charge and the People appealed. The Supreme Court held that the coverage of sections 793 and 656 is identical (id. at p. 148-149, 141 Cal.Rptr. 542, 570 P.2d 723) and that, for section 793 and 656 purposes, intent is not an ingredient of an "act." Therefore, although the mental state of the Oregon and California offenses were different, the prohibited act of the defendant was the same for both offenses. The dismissal was affirmed.

People v. Walker (1981) 123 Cal.App.3d 981, 177 Cal.Rptr. 147, consistent with Belcher and Comingore, held that a Nevada conviction of receiving stolen property (checks stolen in a California robbery) did not bar a California robbery conviction.

Most similar to the instant case is People v. Brown (1988) 104 Cal.App.3d 1444, 251 Cal.Rptr. 889. Brown and four confederates, while in Nevada, planned a burglary of a California jewelry store. According to the plan, apparently, they would burglarize the store, take the jewelry, and return with it to Nevada. Their plans were secretly recorded by a police informant resulting in the mass arrest after two of them had entered the jewelry store.

All five defendants, in federal court, were convicted of conspiracy, i.e., and conspiracy to transport stolen property (the jewelry) in interstate commerce.

Then all five defendants, in California state court, were charged with burglary. They asserted a former conviction defense (§ 656). The defense was denied and all were convicted.

In rejecting defendants' former conviction defense (§ 656), the majority opinion in People v. Brown did not merely rely on the theoretically different acts required by conspiracy and burglary. Theoretically, conspiracy requires only the act of agreement while theoretically burglary requires an act of physical entry into a structure (with requisite intent). But, as People v. Brown recognized, "one may be guilty of burglary without personally entering a place" (id., at p. 1451, 251 Cal.Rptr. 889) and in Brown only two of the five defendants convicted of burglary had entered "the place."

Thus People v. Brown was forces to consider whether the "acts" of those defendants who did not enter the jewelry store but with, nevertheless made them principals for that entry, were the same "acts" that made t hem guilty of conspiracy. If the two sets of "acts" were identical then, according to People v. Brown[8] (id, at p. 1451, 251 Cal.Rptr. 889), the burglary conviction was barred by the conspiracy conviction. Brown found that the two sets of "acts" were disparate, not identical, and therefore the section 656 defense inapplicable.

[1] With these principles and applications in mind we turn to the instant matter and consider whether appellant's acts constituting the which he was convicted of murder.

According to the federal indictment (No. 82-20061-W) appellant committed the crime of conspiracy to injure a federal witness, Frank C. Webb, by his act of agreeing with two other conspirators that Frank C. Webb be injured and by his two acts in furtherance of that agreement, viz., registering at the Los Angeles Airport Ramada inn on August 7, 1981, and attempting to photograph Frank C. Webb's home in Carson on August 9, 1981.

As in People v. Brown, appellant has failed to demonstrate that it was these acts upon which his murder conviction was based. The record suggests the opposite. E.g., the trial court found "beyond a

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[8]Justice Blease wrote separately, concurring in the judgment, agreeing with the majority's conclusion that section 656 did not bar the burglary conviction, but disagreeing with the majority's reasoning. He did not, as the editor's summary mistakenly states, dissent.

reasonable doubt that the murder of Mr. Webb was intentional and was aided and abetted, counseled (sic), commanded, induced and solicited and required by the defendant, Eddie Lee Galloway, for financial gain within the meaning of Penal Code sections 190-2(A)(1) and 190.2(B)"

Unrelated to appellant's "conspiracy acts" was the testimony of Janet Gillespie who described what appellant said to her in October 1980: "He said that Frank was a mother fucking snitch and that they had set him up and told the cops all kinds of shit and that he was going to pay for it, that he was going to die....[¶] And he said he wasn't going to be there when—or lay a hand on him, but that he had to die."

Even more damning was the testimony of Arthur Thomas, a fellow prison inmate of appellant's and a government informant. Appellant, according to Thomas' testimony, paid Raymond Parker, appellant's cousin $1500 to kill Webb. When Parker told appellant he had done so appellant called Webb's house and found out Parker had lied because Webb answered the phone. Thomas testified that then appellant said he took a photograph of Webb, a photograph of Webb's house, Webb's social security number, and $6000 and sent them all to a professional in St. Louis to have Frank C. Webb killed.

The acts constituting appellant's culpability for murder not being identical to the acts constituting appellant's culpability for conspiracy to injure a federal witness, his conspiracy conviction did not bar his murder conviction.

We therefore hold that the November 8, 1985, decision by Division 3 of this court was not "a manifest misapplication of existing principles," that it constitutes the law of this case, and accordingly appellant's contention that section 656 bars his murder conviction is rejected.

3. Appellant contends the federal conspiracy to injure a federal witness conviction barred the instant conspiracy to murder conviction.

[2] The attorney general argues that section 656 is inapplicable to the instant conspiracy to murder conviction because the "act of agreeing to injure someone and the act of agreeing to injure someone and the act of agreeing to kill someone are very different." We find that observation irrelevant. Although the federal indictment charged only a conspiracy to injure Frank Webb and the instant information

charged a conspiracy to murder him, there was, indisputably, only one conspiracy. Just as the pleading discrepancy between the Oregon charge[9] and the California charges[10] was held irrelevant in People v. Comingore because the defendant's act of unlawfully driving another's vehicle was the same for all the charges, so here the conspiratorial acts were the same. The only conspiracy was to murder Frank Webb (and defraud the insurance companies). That, for jurisdictional or pleading purposes, the federal indictment cast the conspiracy as one "to injure" did not alter appellant's acts.

Since Belcher and Comingore require that we use the elements of the charges, as we would a viewfinder, to focus on the defendant's acts, we do so and find a single image. There was one conspiracy and one act of acts evidencing that conspiracy.

The November 8, 1985, opinion is inconsistent with our conclusion and, in order to avoid an unjust result, we conclude that it does not, in this instance, constitute the law of the case.

We hold that pursuant to section 656 appellant could not be convicted of conspiracy to murder.

4. Appellant contends the California constitutional protection against double jeopardy (Cal. Const., art. I, § 15) barred the instant prosecution.

[3] Appellant claims that "[n]o reported decision addresses the application of this state's constitutional prohibition against double jeopardy (Cal. Const., art. I, § 15)[11] to a successive California

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[9]Using another's vehicle without consent.

[10]Grand theft auto and felony joyriding.

[11]It reads: "The defendant in a criminal cause has the right to speedy public trial to compel attendance of witnesses in the defendant's behalf, to have the assistance of counsel for the defendant's defense, to be personally present with counsel, and to be confronted with the witness against the defendant. The Legislature may provide for the deposition of a witness in the presence of the defendant and the defendant's counsel. [¶] Persons may not twice be put in jeopardy for the same offense, be compelled in a criminal cause to be a witness against themselves, or be deprived of life, liberty, or property without due process of law."

jeopardy (Cal. Const., art. I, § 15)[11] to a successive California prosecution for conduct previously adjudicated in the court of another jurisdiction' and then urges us to adopt an "Interest analysis" test promulgated by the Pennsylvania Supreme Court (Commonwealth v. Mills (1971) 447 Pa. 163, 286 A.2d 638) and developed by the Michigan Supreme court (People v. Cooper (1976) 398 Mich. 450, 247 N.W.2d 866; People v. Gay (1980) 407 Mich. 681, 289 N.W.2d 651).

Contrary to appellant's claim, the issue is not one of first impression. It was considered and rejected in People v. Candelaria, supra, 153 Cal.App.2d 879, 883, 315 P.2d 386.[12]

In light of California's comprehensive statutory protection against double jeopardy and multiple prosecution (§§ 656. 793, 1023, and 654) we decline to expand that protection by discovering some new meaning in our constitutional prohibition ("Persons may not twice be put in jeopardy for the same offense." Cal. Const., art. I, § 15).[13]

We conclude that the instant prosecution was not barred by the California constitutional protection against double jeopardy.

5. Appellant contends there was insufficient evidence that the murder of the victim was linked to the conspiracy to murder the victim.

[4] "An appellate court must view the evidence in the light most favorable to the respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with contrary finding does not warrant a reversal of the judgment. The test on appeal is whether substantial evidence supports the conclusion of justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with contrary

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[12]Candelaria considered California Constitution, article I, section 13, clause 4, the predecessor and identical provision to article I, section 15.

[13]We also reject appellant's contingent contention that this constitutional provision barred the special circumstance finding and sentence of life imprisonment without possibility of parole.

finding does not warrant a reversal of the judgment. The test on appeal is whether substantial evidence supports the conclusion of the tier of facts, not whether the evidence proves guilt beyond a reasonable doubt. the appellate court must determine whether a reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt." (People v. Reilly (1970) 3 Cal.3d 421, 425, 90 Cal.Rptr. 417, 475 P.2d 649. Interior cites and quotation marks omitted.)

The following evidence satisfies the substantial evidence test establishes the nexus between appellant's conduct and the victim's death: appellant sent a photograph of the victim, a photograph of the victim's house, the victim's social security number and $6000 to a professional in St. Louis to have the victim killed; the victim appeared to have been killed by professional: the bathroom screen was removed and never found; no fingerprints or other physical evidence were recovered; the killer apparently waited until all the victim's house guest had left and until the victim was alone in his lighted bathroom before firing a single, fatal shot to the victim's head; appellant had bought and paid premiums on $90,000 worth of life insurance, an investment which depended on the victim's death.

DISPOSITION

The judgment with respect to count I, conviction of first degree murder with special circumstance and firearm enhancement and sentence of life imprisonment without possibility of parole plus one year, is affirmed. The judgment with respect to count 2 is reversed. The $100 restitution fine order is stricken.[14]

LILLIE, P.J., concurs.
JOHNSON, Associate Justice.

Although I concur with the majority's disposition of this case, I write separately to revel the trap our law of the case doctrine lays for the unwary.

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[14]The trial court imposed a restitution fine of $100 pursuant to Government Code section 13967, subdivision (a). This section is inapplicable to crimes committed before its January 1, 1984, operative date. (People v. McCaskey (1985) 170 Cal.App.3d 411, 216 Cal.Rptr. 54; People v. Downing (1985) 174 Cal.App.3d 667, 672, 220 Cal.Rptr. 225.) By respondent's failure to address this issue we infer his concession of it.

As the majority correctly states, under the current law the summary denial of an extraordinary writ petition may constitute law of the case. However, the summary denial of a writ petition which results in an opinion differs greatly from all other writ dispositions in the procedural safeguards provided the parties.

Where the reviewing court issues an order to show cause or grants an alternative writ, the disposition of the petition mirrors that of an ordinary appeal. The parties are permitted to orally argue their case and, following the issuance of the opinion either granting or denying the writ, an opportunity to petition the court for hearing. (See generally Bay Development Ltd. v. Superior Court (1990) 50 Cal.3d 1012, 1024, 269 Cal.Rptr. 720, 791 P.2d 290.)

Where the court issues a peremptory writ the parties may not be permitted oral argument. However, all of the parties receive prior notice of the court's intent to issue the peremptory writ and the respondent and/or the real party in interest may submit briefing on the issues presented. (Palma v. U.S. Industrial Fasterners, Inc. (1984) 36 Cal.3d 171, 178-180, 203 Cal.Rptr. 626, 681 P.2d 893.) Further, after issuance of the peremptory writ, the losing party may petition, the court for rehearing. (Rules of Court, rule 27(a).) In the rehearing petition, the losing party is provided the opportunity to alert the appellate court to any mistakes of law of misunderstanding of facts which resulted in an incorrect decision. (See San Francisco v. Pacific Bank (1891) 89 Cal. 23, 25, 26 P.615, 835; 9 Witkin, Cal.Procedure (3d ed.1985), Appeal, § 683, pp. 655-656.)

However, when a court summarily denies a writ petition, the petitioner is provided neither oral argument nor the opportunity to petition for hearing. (Rules of Court, rule 27(a).) Thus, if the reviewing court is mistaken in its understanding of the facts of the law, there is no opportunity to correct the mistake. The opinion is immediately final and the only remaining avenue for review is a petition for review before the Supreme Court. However, this provides no remedy.

The Supreme Court's function is not to review an inferior court's opinion for error; generally, it is to resolve significant legal issues or to secure uniformity of decision. (Rules of Court, rule 29(a).) Accordingly, the petitioner is unable to successfully petition for review and is left with an opinion which is erroneously decided but which cannot be subject to correction. Further, that opinion can now

become law of the case, precluding the petitioner form raising the issue directly on appeal.

Accordingly, a petitioner is presented with a serious dilemma. If he seeks extraordinary relief, he may return with an erroneous opinion from which he has on recourse. However, since the very nature of extraordinary relief implies the petitioner has not adequate remedy at law, he cannot wait until his appellate rights mature and he can brief the issue with all of the procedural protection to which he is entitled.

I recognize the law of the case doctrine is a rule of procedure and therefore, a prior appellate decision is not necessarily binding upon other appellate courts. Further, the doctrine does not apply where it will result in an unjust decision. However, I cannot ignore that for purposes of comity and convenience the second court will, except in extraordinary circumstance, defer to the opinion of the first court.

Further, this deference to law of the case is almost mandated to the extent the doctrine applies to the trial courts. A trial court has little discretion to disregard law of the case unless there has been intervening precedent which reaches a different result. (Ryan v. Mike-Ron Corp. (1968) 259 Cal.App.2d 91, 99, 66 Cal.Rptr. 224; see People v. Sequeira (1982) 137 Cal.App.3d 898, 901, 188 Cal.Rptr. 470; 9 Witkin, Cal.Procedure, supra, Appeal, § 742, pp. 711-712.)

In terms of fairness, then, I believe the summary denial of a writ petition should not be deemed a prior opinion for purposes of the law of the case doctrine unless the parties are afforded an opportunity to address the appellate court's decision by way of petition for rehearing. As it now stands, a petition for rehearing is not available under the Rules of Court. (Rules of Court, rule 27(a).) I would therefore urge rule 27 be amended to permit a party to petition the court for rehearing where the summary denial of a writ petition results in an opinion disposing of the merits.

APPENDIX - B

Supreme Court
Filed
December 20, 1990
"s/RobertWandruff" Clerk
DEPUTY

ORDER DENYING REVIEW

Second Appellate District. Division Seven, No. 803542
SO18012
AFTER JUDGMENT BY THE COURT OF APPEAL

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

IN BANK,

THE PEOPLE. Respondent

v.

EDDIE LEE GALLOWAY. Appellant

Appellant's petition for review

DENIED.

The Reporter of Decisions is directed not to publish in the Official Appellate Reports the Opinion in the above entitled appeal, filed September 11, 1990, which appears as modified at 223 Cal.App.3d 971. (Cal. Const., Art. VI, Section 14; Rule 976, Cal. Rules of Court.)

"s/ LUCAS "
Chief Justice

APPENDIX - C

S098732

SUPREME COURT

FILED

DEC 19 2001

"s/Frederick K. Ohlrich" Clerk
Deputy

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re EDDIE LEE GALLOWAY on Habeas Corpus

Petition for writ of habeas corpus is DENIED. (See In re Clark (1993) 5 Cal. 4th 750; In re Robbins (1998) 18 Cal.4th 770,780; In re Miller (1941) 17 Cal.2d 734.)

"s/George"
Chief Justice

APPENDIX - D

"Question: When you hit a dead-end there, did you go down and interview Jimmy smith and Otis Ward. These people down in San Diego?

"Answer: That is correct

"Question: Did you ask them whether or not Ray Parker had been in San Diego or to Their knowledge Los Angeles after the September trip?

"Answer: I asked them. They said he had not been to San Diego."

A. If it is in the transcript, then I probably said it.

Q. All right.

Can you give the court a summary of what you did to place—Try and Place Raymond Parker in Los Angeles in 1981? Who did you talk to?

A. I talked to Jimmy Smith, Otis Ward, a guy by the name of Banks, Pam Fuller, whose telephone Jimmy Smith was in, and possibly some others. I can't remember anybody else just off hand.

(Discussion held off the record between Mr. Wesley and Mr. Cron.)

Q. By Mr. Wesley: In the course of your Investigation, did you become aware -- strike that.

You told us that you had heard that Frank Webb was involved in California in some thefts after he came out to California.

Q. What was that, '7 - - '77, '78, when he did come to California?

A. He came, I believe, '76, late '76.

A. And was he charged with some thefts from the East Motor Transportation Company in Long Beach?

A. He was arrested.

Q. Did you receive information that victims of the -- from his work there and the theft that he was involved in, that his life had been threatened by his fellow employees?

A. No, sir.

Q. You didn't receive that information?

A. No, sir.

Q. Did you receive information that the Webbs were distribution -- that Frank Webb was distributing drugs?

The Court: Who was.

Q. By Mr. Wesley: Frank Webb was distributing drugs out of his house in Carson?

A. Did I receive information?

Q. Yes.

A. That he was? I read something in a file that there was some allegations to that effect, but I had no evidence.

(Discussion held off the record between Mr. Wesley and Mr. Cron.)

Q. By Mr. Wesley: As a matter of fact, did you see the investigation done by J. William Litts?

A. Yes.

Q. I think you told us earlier that that was one of the reports that you got?

A. I saw it. It came through one of the insurance companies, yes.

Q. And in the report isn't it true that they indicated that Mr. Webb was employed y the East Motor Transport Company in Long Beach as a truck driver on short runs and that the had a problem with fellow employees by which it was believed that his life has been threatened from time to time and there was to have been a theft of women's apparel and office equipment?

A. Mr. Asari: Your honor, I'm going to object on hearsay grounds.

The Court: I will sustain the objection.

Mr. Wesley: Your honor, he indicated that he relied on these reports in his investigation in this case. He has already indicated that.

The Court: Well, Okay, your question isn't that exactly, is it?

Mr. Wesley: My question was whether or not he had received information of this sort and he said he did not, and now I'm indication to the court the portion of this investigation report which he provided to us.

The Court: To the extent -- I will permit it -- I will sustain the objection but permit it to be used for the limited purpose of asking him whether or not he received this information and based his opinion on this information.

Mr. Wesley: That's correct. I'm not asking whether it is true or not, I'm just asking whether he received this information.

The Witness: I saw that information in Sergeant Morck's report, but I don't read everything that other people write and I was investigating the case and I had no evidence whatsoever that Frank Webb had ever been involved in any drugs or anything like that.

Q. By Mr. Wesley: So you received the information about the theft and you even arrested on the theft, but you didn't know much more about it than that?

A. I had talked to the deputy sheriff involved in that and know he had been arrested.

Q. You didn't go over to East Motor Transport Company to talk to the people? You weren't that concerned?

A. I did go to the East Texas Motor Later after Frank was dead. I obtained their records.

Mr. Cron: May I?

The Court: I'm Sorry

Mr. Cron: May I?

The Court: Any objection, Mr. Asari?

Mr. Asari: None, your Honor. I think Mr. Arnold can handle it.

The Court: All Right. You may.

Cross — Examination

By Mr. Cron:

Q. You say that you never promised Arthur Thomas anything. Correct?

A. That's correct.

Q. But ultimately in some form or another you went to bat for him to try and help him out at some point down the road! Is that correct?

A. I don't know whether I went to bat for him. The U.S. Attorney, Assistant U.S. Attorney, called.

Mr. Thomas had written a letter to Assistant U.S. attorney Philip Canale. Who had been the Attorney General for the State of Tennessee for 24 years and consequently he had gotten his name somehow and he called while I was there in Los Angeles and asked me who Arthur Thomas was.

Mr. Canale had prosecuted one of the families in this group of insurance. The Phillips family. He had handled those investigations.

When I told him who Arthur Thomas was, and I think maybe Mr. Faulkner may have said something to him as to who Arthur

Thomas was, but as far as me going to bat for Arthur Thomas, I did not.

Q. Okay.

But someone in the U. S. Attorney's Office in some form or another did go to bat for Arthur Thomas; is that correct?

A. I don't know that they did. I heard that they did.

Q. Okay.

A. So I don't really know that.

Q. Well, let's just look at the numbers then. Arthur Thomas, in his most recent caper was facing somewhere in the neighborhood of 25 years as a third time looser?

A. That's correct.

Q. And he ended doing five years. Right?

A. That's correct.

Q. Which would be less than you would expect for someone with his record; is that correct?

A. That's correct.

Q. All right --

A. Can I clarify this?

Q. Go ahead.

a. I found out that Arthur Thomas had turned himself in and also that he had had a stick inside a paper sack and had robbed some

convenience store alleging there was a gun inside. And he did this on two occasions which carried the stigma of being an armed robbery even though he was not armed.

And the information was that he turned himself into this deputy sheriff and confessed to that and then he wrote this letter and laid out what he had done and asked to be able to plead to a five-year count rather than getting habitual criminal act, and I think the letter was provided to you in discovery, so I have the same information.

Mr. Canale may have made a call. I don't know that he did make a call, but I heard that he did so will have to ask maybe him or Mr. Faulkner as to whether or not he did.

Q. Okay.

A. He was allowed to plead to that five-year charge and serve at the "P" Farm which is unusual.

Q. Right. It would seem unusual wouldn't it. That he would be, if he's facing 25 years. And ends up with five year. That there must have been something more than the fact he turned himself in and wrote a letter requesting a five-year sentence?

Wouldn't it seem that way to you based on your experience?

A. Well, I've seen -- in New York I've had guys with 29 arrest and get probation, so you just never know what the judges will do, you know.

The Court: It is prosecutor; not the judges.

The Witness: So I'm not surprised. I've been in this 19 years and I'm not surprised at any sentences, because it is not my business as to what the judge gives.

The facts he gets and he makes his evaluation, so I don't know what his thinking was on that.

Direct Examination

By Mr. Asari:

Q. Mr. Thomas, how old are you?

A. 31 years of age.

Q. Are you a resident of Memphis, Tennessee

A. Yes, Sir.

Q. Are you presently serving time there on a robbery charge.

A. Yes, Sir.

Q. Were your convicted of is it two or three robberies?

A. Three

Q. Okay, and did you pretend that you had a gun and take some money from convenience stores?

A. Yes, Sir.

Q. How much time are you serving on that case?

A. A five-year sentence.

Q. When were you sentenced?

A. I believe September 25, 24, something like that.

Q. Of what year?

A. Of 1987.

Q. And based on your prior record, were you facing a possible life sentence under the Tennessee habitual criminal act?

A. That's true.

Q. And did you write a letter to someone by the name of Canale asking for a lesser sentence?

A. That's correct.

Q. And in that letter did you explain how you had cooperated with the Los Angeles authorities on a murder case?

A. That's correct.

Q. Now, let me ask you if you've been in trouble before and the nature of that trouble. First of all, have you been in trouble before with the law?

A. Before now?

Q. Yes.

A. Yes, Sir.

Q. When were you first convicted of a felony?

A. First convicted was in 1976. I believe.

Q. What was the felony?

A. The felony was bank robbery.

Q. And how old were you at the time?

A. I believe I was 19, 20 years old. I can't remember.

Q. Were you the so-called wheel man in that bank robbery?

A. Yes, Sir.

Q. Did you plead guilty to that charge?

A. Yes, Sir.

Q. What was your sentence?

A. Six-year sentence.

Q. Did you serve the six years?

A. Yes, I did.

Q. Okay. Initially did you serve the full six years?

A. I served four and I went back to serve two.

Q. When you served four, I take it you were released on parole; is that correct?

A. That's correct.

Q. Do you remember the name of your parole officer?

A. Geraldine Summerfield.

Q. And were you violated on that parole?

A. Yes, Sir.

Q. For what reason?

A. For a misdemeanor receiving and concealing.

Q. Was it a misdemeanor or was it a felony?

A. Well, it was a misdemeanor and then made it to a felony. They passed a law.

Q. Did you plead guilty to that receiving and concealing?

A. Yes, Sir.

Q. What sentence did you receive on that?

A. S ix-month sentence.

Q. As far as the parole violation is considered. Did you receive or did you admit guilt on that parole violation?

A. Yes, Sir.

Q. How much additional time were you facing on that parole violation?

A. A maximum of two years.

Q. Did you serve that two years?

A. Yes, Sir.

Q. So the -- essentially you serve the first four years of the bank robbery sentence, and after admitting the violation you served basically the full six years?

A. That's correct

Q. Was it during the time that you were facing the parole violation and facing this receiving and concealing charge that you were in Shelby County Criminal Justice Complex?

A. That's correct.

Q. During that time did you see anyone in the jail facility there who is now in the courtroom?

A. Yes. Galloway.

Q. Okay, you looked over to your right. What is that person wearing now?

A. He is wearing looks like a slack suit with a white shirt.

The Court: The defendant Mr. Galloway for the record.

APPENDIX - E

COUNTY OF LOS ANGELES SHERIFF'S DEPARTMENT SUPPLEMENTARY REPORT

DATE 10-4-01 FILE NO 081-14581-1615-010

C. Murder, 187 PC Action Taken ACTIVE

V. WEBB, FRANK C. MN/34

I. WEBB, MARILYN J. FW/31

Informant Webb. the wife of Victim Webb, stated that at approximately 0050 hours this date she heard her small dog, who was in the backyard of the location, begin to bark. The informant looked into the backyard and saw nothing. The dog continued barking for approximately five minutes. The informant then heard a noise from the rear (northwest) portion of the house she described as what "sounded like a bullet gun or an air gun" .She said that it was not loud. She then went to the northwest bathroom and found her husband lying on the floor.

The informant also said that about a week ago the victim had received a threatening phone telling; the victim to leave town or he would be killed. The victim had recently testified in a trial in the state of Tennessee.

I observed that the bathroom window where the victim laid was open approximately 8" wide and the screen from the window was missing. Immediately outside the window there was a ladder approximately 6' high.

The informant said the window screen had been there earlier in the evening and that the ladder belonged to her, however she could not remember if she or the victim had placed it there.
A search of the area was made for the window screen with negative results.

Joseph Sanchez MM/40 who lives across the street from the location at 19528 S. Caney St. (phone 632-0787), stated that he was called by the informant at 2400 hours. He arrived at the location shortly after, prior to any deputy or Fire Dept. personnel and that he observed the

victim lying face down in the bathroom. He then escorted the informant out of the area and into the living room and awaited our arrival. He also said that he did not hear any gunshots.

It should be noted that the informant said that at 1700 hours on 10-3-31 she and the victim had a verbal altercation. The victim left the location and returned at 2300 hours.

Carson Station Watch Commander Lt. Owens notified at 0010 hours.

COUNTY OF LOS ANGELES SHERIFF'S DEPARTMENT
SUPPLEMENTARY REPORT

DATE 10-4-01 FILE NO 081-14581-1615-010

C. Murder, 187 PC Action Taken ACTIVE/WITNESS NAMED

V. WEBB, FRANK C. MN/34

W— WETON, MARGARIT FN/44

19512 Scoby Ave., Carson

Phone 774-2397

While assisting Unit 165 Deputy J. Nadeau re 245 gunshot victim, we were able to contact Margarit Weton, Mrs. Weton's residence is located diagonally northwest from the victim's house. She told us that at approximately 0050 hours she heard what sounded like a fence gate being slammed closed. The noise seemed to have originated at or near the fence between her residence and 19520 S. Scoby Ave. just south. When she looked outside she saw no one nor heard any vehicle departing.

An attempt to contact the resident at 19520 S. Scoby Ave. met with negative results.

D. Garcia, #119768, and
G. Aguilar, #108489, Deputies
Unit 164B PM'S
Approved: R. Devot, #022442, Sgt.
Carson - RM

Assigned: Homicide Bureau

DATE November 16, 1982

FILE NO 081-14581-1615-010

C. Murder, 187 PC

Action Taken ACTIVE
EVIDENCE HELD. CC#81-12590

V. WEBB, FRANK C. MN/34

EVIDENCE HELD:

Evidence held Item #1: One (1) .32 caliber expended bullet.
(Lab Receipt No. C98230)

On Sunday, October 4, 1981, at 0130 hours, Investigators MORCK and YAMATO were detailed from their respective homes to investigate the circumstances surrounding the death of Victim WEBB .

Investigators arrived at the location, 19515 Caney Street, City of Carson, and contacted Deputy NADEAU who related the facts in this matter as contained in his first and supplemental report, indicating that at 0050 hours they had received a call of an assault victim at that location.

Upon his arrival they were met by the victim's wife, MARILYN, who indicated to him that her husband had been shot in the bathroom of their residence.

Investigators observed the residence to be a single-family dwelling located on the west side of the street. Upon entering the residence we were directed to the bathroom area which was connected to the master bedroom and was an approximately 6-foot square room with a window located on the north wall.

Investigators observed the victim to be lying on the floor in between the sink and the toilet. His head was facing the east wall. The victim was nude, and there was what appeared to be a small caliber bullet wound to the top right side of the victim's head. There was also observed a split in the victim's nose which investigators later determined was caused by the victim falling striking the sink on his way to the floor.

Investigators observed the bathroom window to be opened and covered with a shower curtain. An examination of this curtain revealed no obvious powder burns, tears, or blood spatterings.

Investigators made a thorough search of the bathroom and bedroom area in an effort to recover any expended shells or bullets, and this search met with negative results.

Investigators then exited the residence and went around through the rear yard to the north side of the house where we observed a 6-foot wide step ladder to be in an open position and standing directly alongside the bathroom window. From the position this step ladder was in investigators determined that an individual could have positioned himself an the bottom rung of the ladder and moved aside the curtain and have a clear shot at the victim if he was in the area of the sink or toilet within that room. There was also room for an individual to just stand on the sidewalk and also have the same line of fire, depending on the height of the suspect as the window measured only 48 inches from the floor to the window sill.

Investigators made a search of the immediate area in an effort to recover any expended shells , and this also met with negative results . The victim's wife was questioned as to the condition of the window prior to the shooting, and she stated she did not know whether the window was open or closed. She believed it to have been left open a few inches and, further, that to the best of her memory there had been a screen on the window. Investigators also noted that there was no screen on the window at the time of our examination and, further that a thorough search of the rear yard and adjoining yard no screen as ever found.

The yard on the north side of the residence was approximately l2-feet wide with a 6-foot high 4-inch wide block wall fence separating the westbound yard from the adjoining yard.

It should be noted that when questioned about the position of the step ladder Mrs. Webb stated that Frank (victim) had been working on the television antenna and that he placed the ladder in the position it was found in at least a week prior to the incident.

Investigators, along with uniformed officers, continued searching the backyard in an effort to obtain footprints or any other type of evidence indicating someone had been in the rear yard, and were unable to find any footprints.

It should be noted that along the west side of the rear yard the westbound residence was separated from the adjoining neighbor's

residence by a 6-foot wooden fence, and between that and the neighbor's yard was also a 6-foot wooden fence there is an approximate 30-inch space which contains nothing but weed growth. These fences when checked by investigators were very unstable it was felt that if an individual had tried to climb over most of these wooden fences it would have left some indication of an attempt, i.e. broke, board scrapings or trampled plant growth.

The south side of the residence is also separated from the neighbor's residence by another approximate 6-foot block wall fence, and the gate to the south side to secured only by a sliding bolt lock. There was no actual locking device on this gate.

Investigators then interviewed MRS. MARILYN WEBB, and she stated substantially the following. That on the evening of October 4th, their neighbors, the Sanchez's were visiting them, along with their children, and that they had dinner together, and after dinner all watched television as they had a tape recorder and were able to watch movies.

Mrs. Webb went on to state that at approximately 9:00 P.M. Mrs. Sanchez returned to her residence along with her two children and the Webb children, and they had planned to spend the evening at their house. Mr. Sanchez, along with his son, Anthony, remained at the Webb residence watching T.V. with Frank (victim) for approximately 30 minutes. Mrs. Webb stated she went into the bedroom to study for a nursing courses that she had been taking. She stated she remained in the bedroom until approximately 11: 30 when Frank came in and advised her that the company had all gone home, and both got ready for bed. She stated she layed there and talked for a short time, and after about 20 minutes she stated she got up and went out into the kitchen to get a coca-cola, and her husband, Frank, got up and she watched him walk into the bathroom and stand at the bathroom sink. She stated she went directly to the kitchen, and while getting some ice cubes from the refrigerator she heard what sounded like a pop come from her bedroom, She screamed to Frank and ran into the bedroom and observed him lying down on the floor in the position officers found him in.

Investigators asked Mrs. Webb if the front and rear doors to her residence were locked and she stated she believed that they were, and it was her opinion that no one could have gotten into the bedroom and out without her having seen him. Although she did say that shortly before midnight their dog who normally stays in the backyard did start

to bark, and that when she got up to get the coca-cola she did go to the rear sliding glass door and look out, but did not see anything.

Investigators asked Mrs. Webb if she could think of any reason why this happened, and she went on to state that her husband had been involved with the Memphis, Tennessee postal inspectors and had testified for the Federal Government in an insurance fraud case which resulted in the conviction of many people back in Memphis.

Mrs. Webb went on to state that on the 22nd of September, 1981, she received a phone call from a man who identified himself as Jones and wished to speak to her husband. When she told him he wasn't home the conversation terminated. Again, on September 23rd this same person called and asked for her husband, and when she advised him he wasn't home he again hung up. After these two phone calls she had a conversation with her husband and he had told her that he didn't know anybody named Jones and did not know who-could be calling him.

Mrs. Webb further related that on Friday, September 25th, the male voice called again, identified himself as Jones, and during this call Mrs. Webb advised him that her husband would be home at 9:00 P.M. that evening and he should call back then. Mrs. Webb stated that when her husband returned home that Friday evening he attached a tape recorder to the telephone, and at 9:00 P.M. sharp the male voice called again and her husband recorded the message. The caller stated in substance that he had been sent to California to kill Frank Webb over the trouble he had caused all his friends back in Memphis by testifying at the trial.

The caller also stated that if he was to get out of town within 3 days and send a phony death certificate to Memphis he would not have to kill him, but if he did not do that the caller stated he would come and kill him.

Mrs. Webb went on to state that the following day, the 26th of September, her husband contacted a postal inspector, MR. CLYDE ARNOLD, in Memphis and advised him of the threat and also got in touch with the Federal Bureau of Investigation.

Investigators asked Mrs. Webb if she thought that Frank took this threat seriously, and she stated she really couldn't tell because he didn't seem to talk about it much, although he did not take any special

precautions as they did not own a gun, nor did they change any of their lifestyle habits.

Investigators then interviewed MARY and JOE SANCHEZ, 19528 S. Caney, Carson. Phone: 632-0787. Mr. and Mrs. Sanchez stated substantially the same as Mrs. Webb, indicating that they had come over for dinner and she later returned home with the children, an that Mr. Sanchez and young Tony stayed until almost midnight. She stated during that time the phone rang once, between 9 :00 or 10 0' clock in the evening, and Frank went over and answered it and hung up after saying "hello." He never mentioned any more about it, but it just appeared as though it may have been a wrong number.

When asked if he knew of any argument or discontent between Mr. and Mrs. Webb, both Sanchez's stated that they appeared to get along fine and they knew of no arguments or hard times between the two. Investigators then canvassed all adjoining houses in an effort to ascertain if anyone saw a vehicle or heard anyone running through the yard, and they met with negative results with the exception of some neighbors having heard dogs barking during the time right around midnight. No one saw or heard a vehicle and no one; actually saw anyone running during the critical times.

On October 5 investigators contacted FBI Agent PAUL BREEN of the Long Beach Field Office. Phone: 432-6951. Mr. Breen stated that he was familiar with the Webb case but that his partner, PETE McGUIRE was in fact the agent in charge of that case. He stated that McGuire was aware of the phone calls and that he had initiated tracing traps put up on the Webb telephones by the security agent from Pacific Telephone and, further, that he had presented the facts as he knew them in this case to the U.S. Attorney for the possible filing of interstate obstruction of justice involving the insurance fraud back in Memphis that was still in the trial stages. It was the U.S. Attorney's opinion that there was no interstate involvement, and therefore any threats would just be a local matter.

Agent Breen stated the Watch Commander, LT. SIEBERT, of Carson Station, was contacted and advised by McGuire only that Mr. Webb was possibly involved in some sort of an extortion and that he would appreciate if Carson would have extra patrol checks on their residence. This was agreed to by the Watch. Commander and patrol checks were initiated. Lt. Siebert also advised Agent McGuire to recontact him by Monday, September 28 and advise him if anything more had

developed or to advise him of the nature of the case. Mr. McGuire never contacted the Carson Station again regarding this case.

Investigators then contacted Memphis, Tennessee Postal Inspector C. J. ARNOLD. Phone: (901) 521 4191. Mr. Arnold advised investigators that Frank Webb was a primary witness in the conviction of more than five individuals back in Tennessee and that his testimony was in fact going to be used against two more defendants, and their trial was to begin sometime in November of 1981.

Mr. Arnold stated that he was aware of a threatening phone call as Frank Webb had been in touch with him and in fact had played the tape for him. Further, that he had contacted the Long Beach FBI and also requested an investigation be initiated by them into the case.

Mr. Arnold stated that he would come out to California with his files, and he expected to arrive on October 6th.

On Monday, October 5th, a post mortem examination was conducted by DR. GOLDEN of the Los Angeles County Medical Examiner's Office, and his primary findings were that the victim die of a small caliber gunshot wound to the right side of the head. There was no powder tattooing observed around the entrance wound, and the entrance wound, and the path of the bullet appeared too be from right to left in a slightly downward angle with the bullet being recovered on the left side of the head. The bullet was subsequently held as evidence and taken to the Firearms Identification Laboratory where it was determined to be a. 32 caliber fired from an automatic type weapon.

A complete and more detailed report of Dr. Golden's examination will be contained in his protocol which also will be made a part of this file.

After learning from the Crime Laboratory that the weapon used most likely was an automatic, investigators returned to the location on Caney Street and made a thorough search of all of the grass area around the bathroom window, and again met with negative results.

Investigators then contacted Special Agent SHARON LA TEAR in an effort to identify the mysterious call that Webb received at 10:00 P.M. prior to his killing, and were advised that the trap installed by them at the request of the FBI apparently did not work and they were unable to determine what area that phone call came from.

On Tuesday, October 6, investigators met with Agent Clyde Arnold from the U.S. Postal Inspector's Office in Memphis, and after going through all his files concerning the insurance fraud cases that were being worked by their office back in Memphis identified approximately four possible suspect-s in this killing. Mr. Arnold stated he felt strongly that one, EDDIE GALLOWAY was involved as he had been convicted on the basis of Frank Webb's testimony, and he presently was free on an appeal bond. He further stated there were many other individuals involved insurance fraud and that they all worked as a phony accident staging ring wherein two or more people would stage a traffic accident and one would claim to be victim and they would collect from multiple insurance policies in the thousands of dollars for phony medical claims based on the accidents.

Mr. Arnold further stated that it was his information that back around the first of the year there had been talk in Memphis that someone had put a "contract" out.

On Frank Webb and that they had wanted him killed. He only heard this second or third hand from a street informant who stated he had only heard it in conversation and could not attribute the statement to anyone individual.

On October 7, 1981, investigators prepared a letter to Deputy U.S. Attorney DAN CLANCY, 1030 Federal Building. Memphis, Tennessee Phone: (901) 521-4231.

Investigators requested that his office obtain telephone tolls from all of the concerned parties in his lawsuit that lived in Memphis in order to ascertain if anyone had contacts in California.

On October 17, 1981, investigators again met with the victim's wife, MARILY'N WEBB, and at Carson Station made a tape recording of the interview. This interview was substantially the same as the initial interview, and will be transcribed and made a permanent part of this file.

During this statement with Mrs. Webb investigators learned that the threatening phone caller stated to her husband that he knew all of their habits and knew they drove a Volkswagen and a brown van. Mrs. Webb indicated that they did own a brown van, but on August 15, 1981 they sold the brown van, therefore it is investigators' opinion that the information the caller stated to Mr. Webb had to have been

gathered prior to August 15, 1981, as everything else was correct with the except ion of the brown van having been sold.

Mrs. Webb then indicated that she had planned to return to Memphis to live with her mother and stated that hereafter she can be contacted at 474 Jeanne Drive, Memphis, Tennessee. Phone: (901) 398-9976.

On October 23rd investigators received a phone call from Agent Arnold who stated the phone tolls came back and showed, one, EDDIE GALLOWAY, made three calls to the State of California. He listed the phone numbers called as: 670-1600 on August 8, 1981; and it was an 8-minute long phone call. Investigators determined this number to belong to the Ramada Inn at 9620 Airport Blvd, and in fact was a pay phone located in the lobby. He also made a phone call to 777-2028 on July 14, 1981, and investigators determined that number to belong to SANDRA CLEMMONS of 94166 7th Street in the City of Ing1ewood. The third phone call was to the number 6422-8550, and investigators determined that number to also belong to a pay phone in the Ramada Inn on Airport Blvd.

Investigators then attempted to identify Miss Clemmons , and after finding that the phone number had been disconnected and she no longer worked for her former place of employment, investigators did locate Miss Clemmons and found her new phone number to be *777-3477.* Miss Clemmons stated that she did know Eddie Galloway and that she had met, him approximately one year ago back in Tennessee when she was there with sorority sisters for a convention. She stated that Eddie was apart of a male group that were escorts for the girls and that she had only met him once. She stated .that he did call her in August and that she had a dinner date, and after that date she returned to his hotel with him which was the Ramada Inn on Airport Blvd. She stated she did recall the next morning she drove him to the airport.

Miss Clemons stated Eddie Galloway was not with her the entire time he was here as he did go to visit a cousin of his she thought in the Inglewood area, but she...

Q. Now, after -- let me jump back then to the death of Mr. -- Mr. Webb.

Did you assist the homicide detective in any way in the investigation or was your investigation a separate investigation?

A. My investigation was a joint investigation with Segeant Morck in that there were certain ways that we could assist him in supeonaing telephone records through the United State Attorney's Office because I was working obstruction of justice case in that this was my witness and he was murdered as a result of his testimony that was given.

Mr. Wesley: I'm going on object. Motion to strike as a conclusion of the witness.

The Court: that will go out. Everything after the word "murdered." will go out.

The Witness: He was told at the time on October 6 that I would assist him in any way, and the U.S. Attorney worked it out so that we could subpoena certain telephone records to assist him on certain individuals that were suspected that may have been involved in some way in his death.

Q. By Mr. Asari: Were there telephone records subpoenaed?

A. Yes, Sir.

Q. From the Memphis Area?

A. Yes, Sir.

Q. What telephone company was involved?

A. I did not investigate anything relating to the murder in California or anything involved in California. This was Sergeant Morck's area.

Q. But you have -- since Frank Webb's death, you've been intimately involved in the investigation of his death, haven't you?

A. I have been involved, Yes.

Q. And you've been in California on numerous occasions to interview witnesses in that investigation?

A. I went to San Diego, Yes, Sir.

Q. Okay. Now --

A. And also came to L.A.

Q. Do you -- do you know who Mr. Litts is?

A. (No audible response.)

Q. Investigator that wrote that report?

A. There was somebody I met with one of the insurance companies, and I'm not sure it was Mr. Litts, but I did meet somebody from the insurance company.

Q. Okay.

Now, is there a reason why you did not follow up on the assertion in Mr. Litts' report that other employees at East Texas Motor Freight wanted to kill Frank Webb or had a motive to kill him?

A. I didn't follow up on it because it was not my jurisdiction on that particular area, because Sergeant Morck was out here and I would leave the part up to him in the Los Angeles area.

Daylight Hours.

(Discussion held off the record between Mr. Wesley and Mr. Cron.)

Q. By Mr. Cron: Did you ever do any type of a -- Did you ever do one or ask to have a gunshot residue test performed on any person connected with this case?

A. Not on any person, No.

Q. Did you have that done on some object?

A. I had the curtain form the bathroom window, test done on the curtain.

Q. And what were the results of that?

A. There was no powder residue on the curtain.

Q. So am I correct in assuming that you found no powder residue anywhere in that location?

A. No.

Q. That -- My statement is correct?

A. That's correct; I found none.

Q. Did you also direct someone to take fingerprints from the ladder?

A. The ladder was of coarse wood grain surface and it is what --

the term is not a printable surface. Being outside in the dampness and the wood grain, you could not obtain a fingerprint from it.

Q. Do you recall what the weather conditions were like that night?

Q. And there was no bullet hole in it either; is that correct?

A. No, there was not.

Q. And when you arrived at that location, did you interview everybody who had been present at the time of the shooting?

A. There was only one person present at the time of the shooting, that was Mrs. Webb.

Q. Well, he had two children; isn't that correct?

A. Yes.

Q. But they weren't home?

A. Well, they were asleep at that time, but when I got -- the time I arrived there, they were over at the Sanchez residence.

Q. Did you determine whether or not they had been home at the time of the shooting or a the Sanchez residence that evening for the evening?

A. I don't recall.

(Discussion held off the record between Mr. Wesley and Mr. Cron.)

Q. By Mr. Wesley: Would it refresh your recollection to look at your report?

A. Yeah.

Mr. Wesley: I am not even sure I have it.

The Witness: I recall there was something about one of the children sleeping over the Sanchez residence.

(Discussion held off the record between Mr. Wesley and Mr. Cron.)

Q. By Mr. Wesley: Do you recall inquiring of Mrs. Webb whether or not at the time of the shooting she was the only person home and being informed that she was?

A. I believe so.

Q. Now, in you investigation did you search the Webb's house thoroughly for weapons?

A. No, I did not.

Q. And in your investigation did you talk with the neighbors? to determine whether or not Mr. Webb had been having any problems with the neighbors?

A. I believe he didn't get along with a neighbor on the west side, but it was neighbor arguments over territorial rights or whatever.

Q. Now, did you determine whether or not at the time of the incident the Webbs had a dog?

A. Yes, they did.

Q. And was that dog on that particular evening at home or was it also at a neighbor's?

A. The dog was in the backyard.

Q. When you arrived?

A. I believe so.

APPENDIX - F

LAW OFFICES OF
DENNIS A. FISCHER

A Professional Company
Paragon Building
1448 15th Street, Suite 206
Santa Monica, California 90404
(213)451-4815

June 12, 1990

CALIFORNIA COURT OF APPEAL

Second Appellate District, Division Seven
3580 Wilshire Boulevard, Room 301
Los Angeles, California 90010

Re: People v. Galloway, 2d Crim. B035428

Honorable Justices:

I have just received the letter dated June 11,1990, submitted by Deputy Attorney General Robert C. Schneider at the court's suggestion during oral argument on June 7, 1990. Two aspects of Mr. Schneider's Position are deserving of response, and had they been offered when the matter was argued, undersigned would have replied briefly thereto. In lieu of thus answering those points orally, which respondent's unfamiliarity with Grady v. Corbin prevented, leave is requested to make those same comments here.

First, had Mr. Schneider suggested during argument (as his June 11, 1990 letter states) that Mr. Galloway's state prosecution was proper because the So-called dual-sovereignty rule allows successive prosecutions by the United States and the State of California without offending the Fifth Amendment's Double Jeopardy Clause (citing Heath v. Alabama (1985) 474 U.S. S2; see also Abbate v. United States (1959) 359 U.S. 187 and Bartkus v. Illinois (1959) 359 U.S. 121), it would have triggered the response that "(t)his rule, however, does not preclude a state from providing greater double jeopardy protection than the United States Supreme court has determined to be available under the Fifth Amendment of the United States Constitution." (People v. Belcher (1974) 11 Cal.3d 91, 97.) As is clear from Belcher, as well

as cases before and since (People v. Candelaria (1956) 139 Cal.App.2d 432; People v. Comingore (1977) 20 Cal.3d 142), California's statutory and constitutional bars to successive prosecutions (Pen. Code §§ 656, 793; Veh. Code S 41400; .Cal. Const., art. I, § 15) do preclude successive prosecution in California following a federal prosecution founded upon the act or omission for which he has been acquitted or convicted.

It necessarily follows that if as respondent tacitly concedes -- the rule announced in Grady v. Corbin (May 29, 1990) U.S. ___ [90 D.A.R. 5851] expands federal double jeopardy protections to Cover the present situation in a state-state context, and if the statutes adopted in California (and other jurisdictions as noted by Belcher) afford "greater double jeopardy protection" than under the federal Constitution, the People cannot prevail by urging a constitutionally-permissible distinction merely. because the successive prosecutions here were in the federal-state framework instead. To do so would effectively eviscerate the consistent line of decisions from Candelaria to Comingore, ironically in the wake of a United States Supreme Court decision that extends double jeopardy principles to a situation that even Mr. Schneider appears to recognize would be available to appellant but for the forum of the first conviction being a federal court rather than in California.

Second and finally, if the Attorney General's ultimate Point is that Mr. Galloway may not invoke Grady v. Corbin notwithstanding the California Supreme Court's repeated interpretation of Penal Code sections 656 and 793 as expand1ng upon (rather than contracting) federal double jeopardy guarantees - Solely because appellant's opening brief "did not raise a federal double jeopardy claim" (Letter, June 11, 1990, p. 2, fn. 1), appellant wishes to make clear that he in no way intended to forsake the United States Constitution in order to rely solely on the California Constitution. Any failure to cite both constitutions in the briefs was an oversight, and most emphatically not a waiver. And to the extent that the only reason Mr. Galloway would not prevail in this case is because he neglected to cite the Fifth Amendment, it would be no more fair to visit that transgression upon this defendant than in People v. Belcher, supra, 11 Cal.3d 91, where our Supreme Court held-that-defense Counsel's failure to adequately

assert the double jeopardy argument (which it found to be reversible error but for the omission) entitled the defendant to reversal of his conviction on. the ground of ineffective representation.

Respectfully submitted,

"s/DENNIS A. FISCHER"

DAF/dkb

cc: Robert C. Schneider, DAG

Eddie Lee. Galloway

APPENDIX - G

S098732

Eddie Lee Galloway
D-85343
California State Prison L.A.C.
44750 60th. Street West
Lancaster Ca. 93536-7620

PETITIONER'S Copy

IN PROPRIA PERSONA
RECEIVED JUN 2 9 2001
CLERK SUPREME COURT
LOS ANGELES IN THE
SUPREME COURT OF
THE STATE OF CALTFORNIA

CASE NO. _____

EDDIE LEE GALLOWAY)
)
Petitioner,)
)
-VS-)
)
ERNEST C. ROE WARDEN et al;)
)
Respondent(s))
_____)

MOTION TO AUGMENT RECORD WITH WRIT OF HABEAS CORPUS

To The Honorable Chief Justice And Associate Justices In And For The Supreme Court Of The State Of California;

Petitioner Eddie Lee Galloway, pursuant to Rule 12(a), 33(b) and 43 of The California Rules Of Court to Augment the record as described herein; Petitioner request that an Augment Reporter's

Transcript to be prepared to contain.

1. A copy of the letter Arthur Thomas wrote Assistant United States Attorney Philip Canale.

2. A copy of Arthur Thomas' Sentencing Transcript on September 24 or 25, 1987 in Shelby County Justice Complex in Memphis Tennessee.

3. A copy of the letters or memos that Assistant United States Attorney Philip Canale wrote to The District Attorney's Office in Shelby County, in Memphis Tennessee in Arthur Thomas behalf.

4. A copy of the letters or memos Assistant United States Attorney Philip Canale wrote to The District Attorney's Office in Los Angeles, in Arthur Thomas behalf.

5. A copy of any and all letters and memos The District Office in Los Angeles wrote to The District Attorney's Office in Shelby County, in Memphis Tennessee, in Arthur Thomas behalf.

6. A copy of the Name of the people at East Texas Motor Freight that wanted to kill Frank C. Webb. See (RT Pp. 307-311 append in EXHIBIT E.) To Petitioner's petition for writ of habeas corpus.

7. A copy of investigator J. William Litts's investigation report. See (RT Pp. 309-310 append in EXHIBIT E.) To Petitioner's petition for writ of habeas corpus.

8. The name of the person that Eddie Lee Galloway paid $6000 to, to kill or murder Frank C. Webb.

The above described documents are Brady Material a refusal to produce this EXCULPATORY EVIDENCE is a violation of the Brady v. Rule. See Brady v. Maryland 373 U.S. 83, 87, 83 S.CT. 1194, 1196 10 L.Ed.2d 215 (1963)

The Brady rule encompasses evidence known only to police investigators and not to the prosecutor, and thus the individual prosecutor has a duty to learn of any evidence favorable to the defense which is known to the others acting on the Government's behalf in the case, including the police. Strickler v. Greene 527 U.S. 263, ___, 119 S.CT. 1936, 1952, 144 L.Ed.2d 286 (1999)

Individual prosecutor has duty to learn of any favorable evidence known to others acting on Government's behalf in case, including police, in order to avoid Brady violation, but whether prosecutor succeeds or fails in meeting such obligation prosecution's.. responsibility for failing to disclose known, material evidence raising to material level of importance is inescapable. United States Constitution. Amendments Fifth and Fourteenth v. Whitley 514 U.S. 419, 437, 438, 115 S.CT. 1555, 1557, 1567, 15 1568, 131 L.Ed.2d 490 (1995)

The due process duty of the prosecution under Brady to disclose evidence favorable to defendant is applicable even though there 18 has been no request by defendant, and encompasses impeachment evidence as well as EXCULPATORY EVIDENCE. United States Constitution Amendment Fifth and Fourteenth Strickler v. Greene 527 U.S. 263, ___, 119 S.CT. 1936, 1948, 144 L.Ed.2d 286 (1999)

Defendant's failure to request favorable evidence doe not leave Government free of all obligation to disclose such evidence to defendant under Brady United States Constitution Amendment Fifth and Fourteenth v. Whitley 514 U.S. 419,433, 115 S.CT. 1555, 1565, 131 L.Ed.2d 490 (1995).

Prosecutorial Misconduct in State criminal proceeding will be grounds for writ of habeas corpus unless prosecution can show that error was harmless beyond reasonable doubt. Chapman v. California 386 U.S. 18, 24, 87 S.CT. 824, 828, 17 L.Ed.2d 705 (1957)

The proper role is of the criminal prosecutor is not simply to obtain a conviction but to obtain a fair conviction Brady v. Maryland 373 U.S. at 87, 83 S.CT. at 1196. It was to insure that defendants are not subject to unfair trials that the limits on prosecutorial conduct evolved. Accordingly when exculpatory evidence is withheld attention focuses on its effect on the defendant's right to due process; the prosecutor's intention are irrelevant. United States v. Agurs 427 U.S. 97, 110', 96 S.CT. 2392, 2400, 49 L.Ed.2d 342 (1976) Thomas v. Cardwell 626 F.2d 1375, 1382 n. 24 (9th Cir. 1980) Cert. Denied 449 U.S. 1089, 101 S.CT. 881, 66 L.Ed.2d 816 (1981) The prejudice to defendant's right to a fair trial is even more palpable when the prosecutor has not only withheld EXCULPATORY EVIDENCE, but has knowingly introduce and argued false evidence this Circuit has acknowledge that "a prosecutor presentation of tainted evidence is viewed seriously and its effects are exceedingly carefully scrutinized" United States v. Polizzi

801 F.2d 1543, 1550 (9th Cir. 1986) A 22 new trial is required "if there is any reasonable likelihood that the false [Evidence] could have affected the judgment of the jury" id[1]

The Supreme Court has stated; (I)t is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment. The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.

The principle that a State may not knowingly use false evidence including false testimony to obtain conviction [is] implicit in any concept of ordered liberty... Napue v. Illinois 360 U.S. at 269, 79 S.CT. at 1177 (Citation Omitted). (Quoting Brown v. Borg 951 F.2d 1011, 1014, 1015 (9th Cir. 1991).

When it appear that the State has engaged in MISCONDUCT the burden falls upon the People to prove, by preponderance of the evidence that Sanctions are not warranted because the defendant was not prejudice by the MISCONDUCT. Nix v. Williams 467 U.S. 431, 444, 104 S.CT. 2501, 2509, 81 L.ed.2d 377, 387 (1984) Murphy v. Waterfront Comm's 378 U.S. 79 n. 18, 84 S.CT. 1594, 1609, n. 18, 12 L.Ed.2d 678 (1964).

For all of the reasons stated, rules of court and case law cited, this motion must be granted in the interest of justice.
Dated: June 26, 2001

Respectfully Submitted"

Eddie Lee Galloway

IN PROPRIA PERSONA

---

[1]This test is equivalent to the Chapman harmless error test United States v. Bagley 473 U.S. 667, 679 n. 9, 105 S.CT. 3375, 27 3382, n. 9, 87 L.Ed.2d 481 (1985).

VERIFICATION

STATE OF CALIFORNIA)
) SS: EDDIE LEE GALLOWAY
COUNTY OF LOS ANGELES) (C.C.F.,§446 & §2015.5; 28 U.S.C.,§1746)

I, Eddie Lee Galloway, declare under penalty of perjury that:

I am the Petitioner, in the above-entitled action; I have read the foregoing documents and know the contents thereof; and the same is true of my own knowledge, except as to those matters stated therein upon information and belief, and as to those, I believe them to be true. Executed this 6th day of May, 2002 at California State Prison Lancaster, California 93536-7620.

Signature: Eddie Lee Galloway
Declarant/Petitioner

****

PROOF OF SERVICE

[C.C.F., §446 & §2015.5; 28 U.S.C.,§1746]

I, Eddie Lee Galloway, am a resident of California State Prison - in the County of Los Angeles, State of California. I am over the age of eighteen (18) and AM/AM NOT a party of the above-entitled action. My State Prison address is: 44750 60th Street West; Lancaster, California 93536-7620.

On May 6th, 2002 I served the following documents:

PETITION FOR WRIT OF CERTIORARI
(Set forth the exact title of document(s) served)

On the party(ies) herein by placing a true copy(ies) thereof, enclosed in sealed envelope(s), with postage thereon fully paid, or with a Trust Withdrawal Slip (CDC-190) attached thereof, in the United States Mail, in the manner provided by at the California State Prison, Lancaster, California 93536 7620, addressed as follows:

SOLICITOR GENERAL OF THE UNITED STATES
ROOM 5614 DEPARTTMENT OF JUSTICE
950 PENNSYLVANIA AVE N.W.
WASHINGTON D.C. 20530-0001

ATTORNEY GENERAL OF
THE STATE OF CALIFORNIA
300 SOUTH SPRING ST.
LOS ANGELES CA. 90013

There is delivery service by the United States mail at the place so addressed and/or there is regular communication by mail between the place of mailing and the place addressed. I declare under penalty of perjury that the foregoing is true and correct.

Dated: May 6th, 2002 Signature: Eddie Lee Galloway
Declarant/Petitioner